SUPREME COURT OF THE UNITED STATES.

No. 303.

WILLIAM McGARRAHAN, PLAINTIFF IN ERROR,

vs.

THE NEW IDRIA MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Writ of error	2	1–3
Proceedings in twentieth judicial district court	5–70	3–29
Notice of appeal	68	29
Clerk's certificate	70	29
Opinion of supreme court	71	29–31
Bond	77	31
Certificate	79	32
Citation	79	32
Judgment of supreme court	81	33
Certificate	83	33

1 *Application for writ of error to the Supreme Court of the United States.*

In the supreme court of the state of California.

WILLIAM McGARRAHAN, PL'FF IN ERROR,
vs.
THE NEW IDRIA MINING COMPANY, DEFENDANT.

And the plaintiff in error prays the allowance of a writ of error in this cause to the Supreme Court of the United States, and says that in the proceedings and judgment therein before the supreme court of the state of California manifest error hath intervened in this, to wit: Because the patent from the United States set forth in the record, and upon which the said plaintiff relied to sustain his title to the land in question, was valid and sufficient to maintain his action, but that said supreme court of the state of California decided against the validity of said patent, and for that rea-
2 son rendered judgment against the plaintiff in error.

Wherefore the said plaintiff in error prays that said judgment may be reversed and set at naught.

WILLIAM McGARRAHAN,
By MONTGOMERY BLAIR,
WASH'N, *Feby.* 2*d*, 1875. *His Attorney.*

(Endorsed:) William McGarrahan, Plaintiff in error, vs. The New Idria Mining Company. Petition for writ of error.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of
[SEAL.] the supreme court of the state of California, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between William McGarrahan and The New Idria Mining Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
4 was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath

happened, to the great damage of the said William McGarrahan, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifth day of February, in the year of our Lord one thousand eight hundred and seventy-five.

(Signed) D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD, *Associate Justice of U. S. Sup. Ct.*

5 Original No. 4,091.

In the supreme court of the state of California.

William McGarrahan, appellant, *vs.* The New Idria Mining Co., respondent.

Transcript on appeal. S. M. Wilson, for respondent. B. S. Brooks, for appellant.

San Francisco: Francis & Valentine, book and job printers, engravers, etc., No. 517 Clay street, and 514 Commercial street.

Filed December 17th, 1873. Grant I. Taggert, clerk.

6 In the district court of the twentieth judicial district of the state of California in and for the county of Monterey.

WILLIAM McGARRAHAN, PLAINTIFF,
vs.
THE NEW IDRIA MINING CO., DEFENDANT.

Amended complaint.

COUNTY OF MONTEREY, *ss.*

William McGarrahan, plaintiff in this suit, by this his amended complaint, by Benjamin S. Brooks, his attorney, complains of the New Idria Mining Company, defendant, and for cause of action alleges:

That said the New Idria Mining Company is a corporation organized under the laws of the state of California, having its principal place of business at the city and county of San Francisco.

That heretofore, to wit, on the first day of March, A. D. 1869, the said plaintiff was, ever since has been, and still is, the
7 owner in fee simple, and was on said day, ever since has been, and now is, lawfully entitled to the possession of all that certain real estate and rancho situated partly in the county of Monterey, and partly in the county of Fresno, state of California, known as the Rancho Panoche Grande.

That afterwards on the same day, the defendant wrongfully and unlawfully entered into the possession of a part of said lands, premises, and rancho, and the tenements, hereditaments, and appurtenances thereto belonging, and ousted and ejected the plaintiff from the possession thereof, and have since said last-mentioned day, wrongfully and unlawfully withheld, and does still wrongfully and unlawfully withhold the possession thereof from plaintiff, which portion so wrongfully and unlawfully withheld is bounded and described as follows:

Beginning on the southerly slope of San Carlos mountain, at a post marked N. I. No. 1, in a mound of stones, from which the summit of said mountain bears north about twenty-one chains and the crossing of the lode at the San Carlos mine bears north twenty-seven chains, a pine tree 14 inches in diameter bears north 68°, west 69 links, and a pine tree seven inches in diameter bears south 57°, east 108 links; thence running north 45° east 30 chains; thence north 45° west 100 chains, 97 links; thence north
8 48½°, west sixty-nine chains, sixteen links; thence south 45°, west twenty-five chains, sixty-five links; thence south 45°, east one hundred and seventy chains, to the place of beginning, and containing four hundred and eighty acres.

And for a further and other cause of action the said plaintiff alleges that the said defendant heretofore, to wit, on the first day of March, A. D. 1869, with force and arms unlawfully entered into and upon certain lands and tenements of the plaintiff, then in his lawful seizure and possession, being situate, lying, and being in the county of Fresno, in the state of California, bounded as follows, that is to say: commencing at a post marked N. I. No. 1, in a mound of stones on the southerly slope of San Carlos mountain, from which the summit of said mountain bears north about twenty-one chains, and the crossing of the lode at San Carlos mine bears north twenty-seven chains, a pine tree 14 inches in diameter bears north 68°, west 69 links, and a pine tree seven inches in diameter bears south 57°, east 108 links; thence running north 45°, east thirty chains; thence north 45°, west one hundred chains, ninety-seven links; thence north 48½°, west sixty-nine chains, sixteen links;
9 thence south 45°, west twenty-five chains, sixty-five links; thence south 45°, west twenty-five chains, sixty-five links; thence south 45°, east one hundred and seventy chains, to the place of beginning, and containing four hundred and eighty acres, with the appurtenances, and ousted and ejected the plaintiff therefrom,

and hath ever since kept and continued in the possession thereof, and with force and arms kept and detained the same from the plaintiff, and during all that time said defendant took, had, and received all the issues and profits of said lands and tenements, and then and there dug up and subverted the earth and soil, and then and there and from thence hitherto, from time to time, have made, dug, and sunk divers mines, pits, shafts, excavations, levels, tunnels, and other mining work, and, by means thereof, have extracted and taken out from the said lands vast quantities of the ores of cinnabar and quicksilver, and have, in and upon said lands, erected, built, and put up various ovens, furnaces, and other means and appliances for working the ores found upon and in, and so as aforesaid taken out of said lands, and extracting therefrom the quicksilver, and have converted and disposed of the same to their
10 own use; and plaintiff avers that the said lands are of little or no value except for their mineral deposits and for their utility in connection with the working of said mines, and that said ores and metals and all the money derived from the working of the mines and mineral deposits aforesaid, on and in said lands, and the sale of the metal and quicksilver obtained therefrom and thereby, are the issues and profits of said land, and of the yearly value of five hundred thousand dollars. And during all the time aforesaid, from said entry thence hitherto, the said defendant has had and received to its own use all the issues and profits of the said lands and tenements, being of great yearly value, to wit: of the value of five hundred thousand dollars, whereby said plaintiff, during all the time aforesaid, not only lost the issues and profits of the said lands and tenements, with the appurtenances, but was deprived of the use and means of working the same, and did necessarily lay out and expend and incur divers large sums of money, amounting in the whole to a large sum of money, to wit: one hundred thousand dollars, in and about the recovering of the possession of the said premises, with the appurtenances, which damages in the whole amount to the sum of five million dollars.

11 Wherefore, plaintiff prays judgment against the said defendant for the recovery of the possession of said premises, and his damages aforesaid to five million dollars, with costs of suits.

B. S. BROOKS,
Attorney for Plaintiff.

CITY AND COUNTY OF SAN FRANCISCO, *ss.*

Benjamin S. Brooks, being duly affirmed, saith: That the plaintiff in this case is out of the state, and for that reason deponent makes this affidavit in his behalf; that he has read the foregoing amended complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true. And he further saith

that all things therein stated are stated upon his information and belief only.

B. S. BROOKS.

Affirmed to before me, this twenty-third day of May, A. D. 1872.
[L. S.] J. H. BLOOD, *Notary Public.*
Filed May 25th, A. D. 1872.

12 *Answer to Amended Complaint.*

(Title of court and cause.)

The New Idria Mining Company comes by its attorney, S. M. Wilson, and answers the amended complaint of the plaintiff, William McGarrahan, and, for answer to the first count of said amended complaint, denies that the said plaintiff, on the first day of March, 1867, or at any other time before or since that day, was, or has been, or now is, the owner in fee simple, or otherwise, and denies that said plaintiff was on said day, or at any time before, or at any time since, has been or now is entitled, lawfully, or otherwise, to the possession of that certain real estate or rancho referred to in the said complaint, and called therein the Rancho Panoche Grande, or any part thereof.

And the defendant denies that afterwards on said day, or at any time whatever, the defendant wrongfully or unlawfully entered into the possession of said part of said lands and premises, or rancho, or the tenements, hereditaments, or appurtenances thereto belonging, described, and referred to in the first count of said complaint, or any part thereof, or of any other part of said alleged lands
13 referred to as said Rancho Panoche Grande. But defendant admits and avers that more than five years before the commencement of this action it lawfully entered into the possession of said tract of land particularly described in said first count of said complaint as containing four hundred and eighty acres, and has ever since been in the open, notorious, and actual possession thereof, claiming the same adversely to said plaintiff.

And the defendant denies that on the first day of March, 1869, or at any other time, this defendant ousted or ejected the plaintiff from the possession of said tract of land described in said first count of said amended complaint as containing said four hundred and eighty acres, or any part thereof, or of any of the lands referred to in the said first count of said complaint; and denies that the said plaintiff was ever in possession of any of said lands described or referred to in said first count of said complaint; and defendant denies that ever since the first day of March, 1869, or at any time before or since, the defendant has wrongfully or unlawfully withheld, or that it now wrongfully or unlawfully withholds the possession of said lands, or any of said lands, or any part thereof, from the said plaintiff.

14 II.

And, for a further and separate defence to said first count of the amended complaint, the defendant avers that it is, and at the commencement of this suit was, the owner and entitled to the possession of said lands lastly described in said first count of said amended complaint, as against the said plaintiff.

III.

And, for a further and separate defence to said first count of said amended complaint, the defendant avers that neither the plaintiff, his ancestors, predecessors, nor grantors, nor either of them, were or was seized or possessed of said premises lastly described in said first count of said amended complaint, or any part thereof, within five years before the commencement of this action, but that the defendant, its predecessors and those under whom it claims title and possession of said land and premises, were and had been for more than five years before the commencement of this action, in the actual, open, notorious, exclusive, and continued adverse possession of said lands and premises, claiming title thereto, adversely to said plaintiff and those under whom he claims.

IV.

15 And, for a further and separate defence to said first count, the defendant avers that said lands lastly described in said first count of said amended complaint are, and for five years and upwards last past have been, mining property and claims, and that neither the plaintiff, his ancestors, predecessor, nor grantor, was seized or possessed of said lands, or any part thereof, within two years before the commencement of this action, but for more than two years prior to the commencement of this action the defendant has been in the open, notorious, actual, exclusive, and continued possession of said land, claiming the same adversely to the plaintiff.

V.

And for answer to the second count or cause of action set forth in said amended complaint, the defendant denies that on said first day of March, A. D. 1869, or at any other time, the defendant, with force or arms, or unlawfully entered into or upon said lands and premises described in said second count, or any part thereof, and denies that said lands, or any part thereof, was then, or at any time whatever, in the lawful or any seizin or possession of said plaintiff.

16 And the defendant denies that on the first day of March, 1869, or at any other time, the defendant ousted or ejected the plaintiff from said land, or any part thereof, and denies that it hath ever since, or any time, with force or arms, kept or continued in the possession of said land, or any part thereof, or with force or arms kept or detained the same from plaintiff.

And the defendant admits and avers that during the time in that behalf alleged, viz: from said first day of March, 1860, the defendant has been in the peaceable possession and enjoyment of said lands, and has been using and working the same for mining purposes, and for the cinnabar and quicksilver to be obtained therefrom, and has, during said period, and prior thereto, erected, built, and put up various ovens, furnaces, and other valuable and permanent improvements on said land to the extent and value of about three hundred thousand dollars, which remain ever since and now upon said land, and were so built, constructed, and erected by defendant prior to the commencement of this action, and whilst defendant was holding and claiming said land under claim and color of title in good faith.

And the defendant admits and avers that said ores and metals, and the money derived from the working of said mines and
17 the mineral deposits on said land, and the sale of the mineral and quicksilver obtained therefrom and thereby, are the issues and profits of said land, but the defendant denies that the same are of the yearly value of five hundred thousand dollars, or any other sum approaching or near to that sum, and deny that the plaintiff during all or any of the time in that behalf alleged, lost the rents or profits, or any rent or profit, of said lands or tenements, or had any right or claim to the rents or profits, or could in any manner lose the same.

And defendant denies, on information and belief, that the plaintiff did, necessarily or otherwise, lay out, or expend, or incur, divers or any large sums of money, either amounting to the sum of one hundred thousand dollars, or any other sum, in or about the recovery of the possession of said premises and appurtenances, or either, and deny that said plaintiff ever has recovered the possession of said land or any part thereof, and deny that said plaintiff's damages, in the whole or any part, amount to the sum of five million dollars, or any sum whatever.

18 VI.

And, for a further and separate defence to the said second count of said amended complaint, the defendant avers: that it is, and was at the commencement of this action, the owner and entitled to the possession of said lands described in said second count of said amended complaint, as against said plaintiff.

VII.

And, for a further and separate defence to said second count of said amended complaint, the defendant avers that neither the plaintiff, his ancestors, predecessors, nor grantors, nor either of them, were or was seized or possessed of said premises described in said second count, or any part thereof, within five years before the commencement of this action, but that the defendant, its predecessors, and those under whom it claims title and possession of said lands

and premises, were and had been, for more than five years before the commencement of this action, in the actual, open, notorious, exclusive, and continued adverse possession of said lands and premises, claiming title thereto adversely to said plaintiff and those under whom he claims.

VIII.

And, for a further and separate defence to said second count of the amended complaint, the defendant avers that said lands described in said second count are and were, for five years and upwards before the commencement of this action, mining claims and property, and that neither the plaintiff, his ancestor, predecessor, nor grantor, nor the person under whose title the said action is prosecuted, nor the ancestor, predecessor, nor grantor of such person was seized or possessed of the said lands, or any part thereof, within two years before the commencement of this action.

19

Wherefore the defendant prays judgment against said plaintiff that it may be hence dismissed, with costs and such other judgment as is meet in the premises.

S. M. WILSON,
Attorney for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Thomas Bell, being duly sworn, says, that he is an officer, to wit, the President of the New Idria Mining Company, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true.

(Signed) THOMAS BELL.

Subscribed and sworn to before me, this twenty-fourth day of September, 1872.

[L. S.] F. J. THIBAULT,
Notary Public.

Filed September 27, 1872.

20 *Stipulation.*

(Title of court and cause.)

It is stipulated and agreed by and between the parties to this suit, by their respective attorneys, that the convenience of witnesses and the ends of justice will be promoted by a change of the place of trial of this cause from Monterey County to Santa Clara County, and therefore consent that the place of trial of said cause be changed from the said county of Monterey to the said county of Santa Clara.

And it is further in like manner stipulated and agreed that upon the trial of this cause the issues of title and of the right to the possession of the land shall first be tried, and in the event judgment is finally rendered for the plaintiff, the damages for the detention and other causes claimed in the complaint shall be afterwards ascertained.

May 26, 1873.
(In duplicate.)

S. M. WILSON,
Attorney for Paintiff.
B. S. BROOKS,
Attorney for Defendant.

(Endorsed:) "Filed May 27, 1873.

A. W. POOLE, *Clerk.*

Filed August 16, A. D. 1873.

C. FINLEY, *Clerk.*

21 *Findings.*

(Title of court and cause.)

This cause having regularly come on for trial—a trial by jury having, by the consent of the attorneys of the plaintiff and defendant, and with the consent of the court, been duly waived—and the plaintiff and defendant having been fully heard thereon by counsel, the court finds the following facts, to wit:

That the said plaintiff on the first day of March, A. D. 1869, was not nor at any time before or since that day has he been, nor is he now the owner, in fee simple or otherwise, nor was he ever in possession, or entitled to the possession of the land or real estate particularly described in the cause of action firstly set forth in the amended complaint, viz:

Beginning on the southerly slope of San Carlos Mountain, at a post marked N. I. No. 1, in a mound of stones from which the summit of said mountain bears north about twenty-one (21) chains, and the crossing of the lode of the San Carlos Mine bears north twenty-seven (27) chains, a pine tree fourteen (14) inches in diameter bears north (63°) sixty-three degrees, west sixty-nine (69)
22 links, and a pine tree seven (7) inches in diameter bears south fifty-seven degrees (57°), east one and eight one-hundredths (1.08) links; thence running north forty-five degrees (45°), east thirty (30) chains; thence north forty five degrees (45°), west one hundred (100) chains, ninety-seven (97) links; thence north forty-eight and one-half degrees (48½°), west sixty-nine (69) chains, sixteen (16) links; thence south forty-five degrees (45°), west twenty-five (25) chains, sixty-five (65) links; thence south forty-five degrees (45°), east one hundred and seventy (170) chains to the place of beginning, and containing four hundred and eighty (480) acres.

That the lands and tenements mentioned and described in the cause of action secondly set forth in said amended complaint, on the first day of March, A. D. 1869, were not nor was any part or por-

tion thereof, nor have they any part or portion thereof been since, nor are they or any part or portion thereof now the lands and tenements of the plaintiff, or in his seizure or possession.

And as a conclusion of law the court adjudge that the plaintiff is not entitled to recover in this action, and that judgment be entered for the defendant.

D. BELDEN,
District Judge Twentieth Judicial District.

23 Service of a copy of the within findings of the court is hereby admitted, this seventh day of November, 1873.

B. S. BROOKS,
Attorney for Plaintiff.

(Endorsed:) "Filed Nov. 8, A. D. 1873.

C. FINLEY, *Clerk.*
By M. H. GAY, *Deputy Clerk.*

Further Findings.

(Title of court and cause.)

I.

On the twenty-ninth day of December, 1862, there was pending before the Hon. Caleb B. Smith, Secretary of the Interior, an application in due form on the part of the plaintiff, as successor in interest of Vicente P. Gomez, for a patent to the Rancho Panoche Grande, including the premises described in the complaint.

II.

That on said twenty-ninth day of December, 1862, the said secretary rendered his decision on the said application, and ordered and adjudged in these words: "My conclusion is that the decree of the district court for the southern district of California confirming the grant, has become final. The United States has no longer
24 any interest in the controversy; no claim of third parties has been interposed. The suggestion of fraud in the grant, or in the manner of procuring its confirmation, are *res adjudicata*. And I am unable to discover any reason why a patent should not be issued in conformity with the decree of the court and the survey. You will, therefore, issue a patent for the land in accordance with the survey, as reported by the surveyor-general."

III.

That afterwards, on the fourth day of March, A. D. 1863, the matter again coming before Hon. John P. Usher, then being Secretary of the Interior, he rendered his decision, and ordered and adjudged:

"I think, therefore, that the decision of my predecessor, directing the patent, was correct, and that it should issue. I would advise

you, however, to cause to be inserted in the patent, by way of recital, the fact that it was issued upon a survey made under the act of June 2d, 1862; and also, by way of greater caution, to insert a provision that the description of the land therein conveyed was to be taken against the United States, or any person making claim to the land, as prima facie evidence only of the true location of the land granted, and to be modified or avoided in that respect, if the same should be erroneous."

IV.

That afterwards, and on or about the fourteenth day of March, 1863, there was recorded in a volume kept at the General Land Office at Washington for the recording of patents of the United States issued upon California confirmed Mexican grants, being volume four of such records, upon pages 312 to 321, inclusive, a copy of which is hereto annexed and made part hereof.—(See folio 68 to folio 116.)

V.

That on the eleventh day of July, 1870, the plaintiff demanded an exemplification thereof and tendered the fees therefor, but said exemplification was not granted to him.

VI.

That on the 25th day of July, 1870, there was written across the face of the said record, and signed by Joseph S. Wilson, Commissioner of the General Land Office, and J. N. Granger, Recorder of the General Land Office, as follows:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July 25th*, 1870.

"The record from pages 312 to 321, inclusive, was made in accordance with the custom at the time, in anticipation of the original being submitted to the officers whose duty it is under the law to sign land patents, but an order dated March 13th, 1863, having been received from the acting Secretary of the Interior to suspend the execution and delivery of a patent under the decision of the department of the fourth of March, 1863, until further advised in the case by the secretary, the form of patent which had been prepared, and from which the aforesaid record was made, was not submitted for signature, and has never been dated, signed, nor delivered.

"JOS. S. WILSON, *Commissioner*.

"J. N. GRANGER, *Recorder*."

VII.

That on the 15th day of June, A. D. 1871, the plaintiff presented a memorial addressed to Hon. Columbus Delano, Secretary of the Interior, requesting a restoration of the said record, upon which His

Excellency, U. S. Grant, President of the United States, made his rescript as follows:

"Respectfully referred to the Secretary of the Interior.

27 "It seems to me that if the records of the Interior Department have been changed, as herein stated, they should be restored to the condition in which they were when this Administration came into office.

"In regard to your furnishing Mr. McGarrahan with copies of the original record, I would be guided by precedent in like cases.

"June 16, 1871." "U. S. GRANT."

VIII.

On the twenty-second day of December, 1857, the said Vicente P. Gomez, by deed duly executed under his hand and seal and delivered to the said plaintiff, granted and conveyed to him all his, the said Vicente P. Gomez, right, title, and interest in the said Rancho Panoche Grande. That after July 11, 1870, said record as originally made was altered and changed, as shown by document marked Exhibit No. 2, as hereto annexed, and the certificate thereto annexed.

Plaintiff's counsel, in offering said certified copy, objected to so much of said certificate as reads as follows:

"And I further certify that the original instrument set forth in the above-named pages of said volume 4 was never executed by

28 the President of the United States, nor delivered to the grantee, and that said original instrument is now on file in this office, but neither it nor the copy thereof in said volume 4 is regarded or treated as a part of the official records of the General Land Office."

And the court ruled that so much of said certificate as is above set forth would be by it disregarded.

In open court, Nov. 15, 1873.

Ex'd. D. BELDEN, *Dist. Judge.*

The United States of America to all to whom these presents shall come, greeting:

Whereas, it appears from a duly authenticated transcript filed in the General Land Office of the United States, that pursuant to the provisions of the act of Congress approved the third day of March, one thousand eight hundred and fifty-one, entitled "An Act to ascertain and settle the Private Land Claims in the State of California," Vicente P. Gomez, as claimant, filed his petition on the ninth day of February, 1853, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition he

29 claimed the confirmation of his title to a tract of land called Panoche Grande, of the extent of four square leagues, situated in the county of San Joaquin, and state aforesaid; said claims

being founded on a Mexican grant to the petitioner, made in the year 1844, by Manuel Micheltorena, then governor of Upper California.

And whereas, the board of land commissioners aforesaid, on the sixth day of March, 1855, rendered a decision rejecting said claim, which decree or decision was on appeal reversed by the district court of the United States for the southern district of California, by decree rendered as follows: "Vicente P. Gomez, appellant, vs. The United States, appellee: case No. 393. 'Panoche Grande.' Transcript No. 569. Decree. This cause came on to be heard on appeal from the decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3, 1851, on a transcript of the decision and proceedings of said board, and the papers and evidence upon which said decision was made, and the other evidence adduced by the appellant before this court,

and it appearing to the court that said transcript and notice
30 of intention to appeal have been duly filed according to law,

and counsel for the respective parties having been heard, it is ordered, adjudged, and decreed that the decision of said board of land commissioners be, and the same is hereby, reversed; and that the claim of said appellant is good and valid; and the same is hereby confirmed to him as follows, to wit: the tract of land situated in the county of Fresno, State of California, known by the name of 'Panoche Grande,' bounded northerly by the lands of Don Julian Ursua, southerly by the hills, easterly by the valley of the Tulare, and westerly by the lands of Don Francisco Arias, containing four square leagues of land, and no more, provided that quantity is contained within the boundaries aforesaid, and provided also, that if a less quantity is contained within the boundaries aforesaid, that confirmation of such less quantity is hereby made to said claimant, and for a more particular description of which said land reference is hereby made to the map contained in the transcript in this case.

"And it also appearing to this court that heretofore, to wit: on the fifth day of June, A. D. 1857, at a regular term of this court holden in the town of Monterey, State of California, the claim of the appellant in this case has been confirmed by this court, but

that it had been omitted by this court to sign the decree
31 of confirmation at the time the same was made. It is, therefore, further ordered by this court that the same be signed now as for then.

"Given under my hand in open court, this 5th day of February, A. D. 1858.

"ISAAC S. K. OGIER,
"*U. S. Dist. Judge for the S. Dist. Cal.*"

And whereas, it further appears from a duly certified extract on file in the General Land Office from the minutes of the Supreme

Court of the United States, that this cause being brought by appeal before the said court at the December term 1858, the following proceedings were had therein: "Now, on this day, this cause coming on to be heard, the parties appearing by their respective attorneys, the appellant by Sloan & Hartman, esq's, and the appellees by P. Ord, U. S. dist. atty., and after argument of counsel aforesaid, the same is submitted to the court for final adjudication. Whereupon, the court being fully advised in the premises, delivered its opinion confirming the claim of the appellant to the extent called for in the transcript and papers, three leagues or sitios de gañada major, and a decree was ordered to be entered up in conformity with said opinion;" and thereafter, to wit: at the
32 December term, 1859, of the Supreme Court of the United States, the following order was made in this case: "The United States, app'ts, vs. Vicente P. Gomez. Appeal from the district court of the United States for the southern district of California."

"On consideration of a motion made in this cause on a prior day of the present term, to wit: on Friday the 27th day of January, A. D. 1860, by Mr. Attorney-General Black, to rescind the order and decree of this court of the 31st day of January, 1859, docketing and dismissing this appeal, and to revoke and cancel the mandate issued by this court to the district court of the United States for the southern district of California, and of the argument of counsel thereupon had as well in support of as against the said motion: It is now here ordered by this court that the aforesaid decree of this court docketing and dismissing the appeal be, and the same is hereby, rescinded and annulled, and that the mandate issued by this court to the district court of the United States for the southern district of California in this case be, and the same is hereby, revoked and cancelled; and it is further ordered by this court that the clerk of this court do forthwith send a certified copy of this order
33 to the aforesaid district court of the United States for the southern district of California."

"And whereas it further appears from a duly certified transcript on file in the General Land Office, that an order having been made in the district court of the United States for the southern district of California granting a new trial in this case, the said court, on the 4th day of August, 1862, on a motion to vacate and set aside said order, made the following order: 'Vincente P. Gomez, appellant, vs. The United States, appellee, D. C. No. 393, L. C. No. 569. Panoche Grande.' On this day the court delivers its opinion in this case, granting the motion heretofore made by the appellant herein, praying the court to vacate and set aside the order of Hon. Isaac S. K. Ogier, late judge, granting a new trial in this cause. And it is hereby ordered that the previous order of this court made and entered on the 21st day of March, 1861, setting aside all proceedings

had in this cause, and placing the same on the calendar for trial de novo be, and the same is hereby, vacated and set aside."

And whereas it further appears from a duly certified transcript, on file in the General Land Office of the United States, that an order having been made on the 25th day of August, 1862,
84 in the district court aforesaid, allowing appeal in this case to the Supreme court of the United States, the said district court, at the December term, 1862, made the following order: "Vicente P. Gomez vs. The United States, No. 392, Panoche Grande. In this case the court delivered an opinion on the motion submitted the day before yesterday, and ordered that the appeal taken on the twenty-fifth day of August, A. D. 1862, by the United States to the Supreme Court of the United States, from the final decree of confirmation herein, be vacated and set aside, and it is further ordered that the order of this court made on the said 25th day of August, A. D. 1862, allowing said appeal, be and the same is vacated and set aside, and the motion of the United States district attorney for leave to take an appeal on behalf of the United States to the Supreme Court of the United States from the said final decree be and the same is denied." And whereas there has been presented to the commissioner of the General Land Office a plat with a certificate of the survey of the said claim, authenticated by the signature of the surveyor-general of the public lands in California, said survey having been made pursuant to the act of Congress approved June 2, 1862, entitled "An act for the survey of grants
85 or claims of land," said plat and certificate being in the words and figures following, to wit:

UNITED STATES SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA.

Under and by virtue of the provisions of the act of Congress of the second of June, 1862, entitled "An act for the survey of grants or claims of land," and in consequence of a certificate of the United States district court for the southern district of California, a copy of which is hereto annexed, by which it appears that a decision of the said district court has been had, recognizing and confirming the title claim of Vicente P. Gomez to the tract of land designated Panoche Grande, the said tract has been surveyed in conformity with said decision, and I hereby certify the annexed map to be a true and accurate plat of said tract of land, as appears by the field-notes of the survey thereof, made by E. H. Dyer, deputy-surveyor, in the month of July, 1862, under the direction of this office, which, having been examined and approved, are now on file therein.

And I hereby certify that the said tract of land is bounded and described as follows, to wit: Beginning at post in earth mound corner to section one, two, eleven, and twelve, township
86 seventeen south, range eleven east of Mount Diablo meridian, from which post a point on the highest ridge of the

Lomas Muertas (a high range of barren and broken mountains, the eastern slope of which forms the western edge of Tulare Valley) bears north nine degrees west, distant about two miles.

Thence, according to the true meridian, the variation of the magnetic needle being fifteen degrees thirty minutes east, over rolling land to the north of a small valley called Vallecito, north forty chains to post in earth mound, on quarter-section corner, between sections one and two. Station.

Thence west eighty chains to quarter-section corner, on line between sections two and three. Station.

Thence north forty chains to post in earth mound corner to sections two and three, on fourth standard line south. Station.

Thence west, at forty chains quarter-section post in earth mound, eighty chains to post in earth mound corner to section three and four on fourth standard line south. Station.

Thence through township sixteen south, range eleven east, north forty chains to station.

Thence through middle of section thirty-three and thirty-two, west one hundred chains to station.

87 Thence south, at forty chains intersects fourth standard line, south twenty chains west of post corner to sections four and five; thence with a variation of fifteen degrees thirty-five minutes east through township seventeen south, range eleven east parallel to its eastern boundary; at sixty chains enters Vallecito valley, course northwest and south of east one hundred chains to station.

Thence east twenty chains to station on line between sections four and five; thence south, at thirty chains leaves small valley; thence over broken hills near southern edge of said valley, sixty chains to quarter-section corner between sections eight and nine. Station.

Thence east eighty chains to quarter-section corner between sections nine and ten. Station.

Thence south forty chains to corner to sections nine, ten, fifteen, and sixteen. Station.

Thence east one hundred and twenty chains to quarter-section corner, between sections eleven and fourteen. Station.

Thence through section fourteen, south sixty chains to station.

Thence east twenty chains to station.

Thence south twenty chains to station on line between sections fourteen and twenty-three.

88 Thence on section line east, sixty chains to quarter-section corner on line between sections thirteen and twenty-four. Station.

Thence through middle of sections twenty-four, twenty-five, and thirty-six, over high and rough mountains, south two hundred chains to centre of section thirty-six. Station.

Thence east at forty chains quarter-section post in earth mound on line between ranges eleven and twelve east; thence through

township seventeen south, range twelve east, eighty-two chains and fifteen links, to centre of section thirty-one. Station.

Thence south at forty chains quarter-section post in earth mound on line between townships seventeen and eighteen south, sections thirty-one and six on top of a ridge course northwest and southeast; thence through township eighteen south, range twelve east, two hundred and eighty chains to quarter-section corner between sections eighteen and nineteen. Station.

Thence on section line, west twenty-chains to station.

Thence through section nineteen, south sixty chains to station.

Thence east twenty chains to station.

Thence south, twenty chains to quarter-section corner between sections nineteen and thirty. Station.

39 Thence on section line east sixty chains to stations.

Thence through section twenty, north sixty chains to station.

Thence east, twenty chains to stations.

Thence north twenty chains to quarter-section corner between sections seventeen and twenty. Station.

Thence on section line east twenty chains to station.

Thence through section seventeen, north forty chains to station.

Thence east twenty chains to quarter-section corner between sections sixteen and seventeen. Station.

Thence on section line, north eighty chains to quarter-section corner between sections eight and nine. Station.

Thence through section nine east forty chains to centre of section nine, from which the Panoche Grande Peak bears south fifty-six degrees east, distant about seventy chains. Station.

Thence north at forty chains quarter-section post in rock mound on line between sections four and nine, from which a pine tree bears north fifty-two degrees east, distant twenty-four links; another pine tree bears south fifteen degrees west, distant nineteen links,

40 and the San Carlos Peak on the northeast quarter of section four bears north twenty-two degrees east; thence through section four at fifty-four chains and fifty links across Arroyo Panoche Grande, course northwest sixty chains to station.

Thence east twenty chains to station.

Thence north twenty chains to station.

Thence east twenty chains to quarter-section post in earth mound on line between sections three and four. Station.

Thence on section line, with a variation of fifteen degrees fourteen minutes east, north, at forty chains and forty links intersects line between townships seventeen and eighteen south, range twelve east, at post in earth mound corner to sections three, thirty-three, and thirty-four; thence through township seventeen south, range twelve east, over high and broken mountains, with a variation of fifteen degrees thirty-eight minutes east, eighty chains and forty links to quarter-section post in earth mound between sections thirty-three and thirty-four. Station.

Thence through section thirty-three, with a variation of fifteen degrees twenty-seven minutes east, west forty chains to centre of section thirty-three, from which a marked cedar tree, eight
41 inches diameter, bears west, distant forty chains. Station.

Thence through middle of sections, with a variation of fifteen degrees thirty-eight minutes east, north at forty chains post in earth mound at quarter-section corner between sections twenty-eight and thirty-three one hundred and twenty chains to post in earth mound at quarter-section corner between sections twenty-one and twenty-eight, two hundred chains to a sandstone twelve inches long, ten inches wide, and eight inches thick, in a rock mound in deep rocky gulch, from which a steep rock cliff bears north forty-five degrees east; said sandstone is set for quarter-section corner between sections sixteen and twenty-one; thence over alkali hills two hundred and eighty chains to quarter-section post in a mound of alkali soil between sections nine and sixteen. Station.

Thence with a variation of fifteen degrees fifty-nine minutes east, west forty chains to post in mound of alkali soil, corner to sections eight, nine, sixteen, and seventeen. Station.

Thence on section line with a variation of fifteen degrees thirty-eight minutes east, north forty chains to quarter-section post in mound of alkali earth. Station.

42 Thence through section eight, with a variation of fifteen degrees fifty-eight minutes east, west forty chains to centre of section eight. Station.

Thence with a variation of fifteen degrees thirty-eight minutes east, north forty chains to a sandstone rock twelve inches long, ten inches wide, and eight inches thick, in mound of alkali earth quarter-section corner on line between sections five and eight. Station.

Thence on section line with a variation of fifteen degrees fifty-four minutes east, west at thirty chains thirty-eight links enters the narrow valley of the Arroyo Panoche Granee at thirty-nine chains eighty-eight links across Arroyo Panoche Grande fifty links wide course north ten degrees east; thence over low hills, forty chains and thirty-eight links to post in mound at corner to sections five, six, seven, and eight; thence on section line with a variation of fifteen degrees thirty minutes east, eighty chains and thirty-eight links to quarter-section post in earth mound, one hundred and twenty chains and thirty-eight links to post in earth mound at corner to sections one, six, seven, and twelve on line between ranges eleven and twelve east; thence through range eleven east one hundred and sixty chains and thirty-eight links to quarter-section
43 post in mound two hundred chains and thirty-eight links to point of beginning, containing seventeen thousand seven hundred and sixty-eight and seventy-seven one hundredths acres, and being designated in the plat of public surveys as lot number thirty-seven, township sixteen south, range eleven east, lot number thirty-seven, township seventeen south, range eleven east, lot number

thirty-seven, township seventeen south, range twelve east, and lot number thirty-seven, township eighteen south, range eleven east, all of Mount Diablo meridian.

In witness whereof, I have hereunto signed my name officially, and caused the seal of my office to be attached, at the city of San Francisco, this eleventh day of September, one thousand eight hundred and sixty-two.

[SEAL.] E. F. BEALE,
U. S. Surveyor-General, California.

And whereas, application having been made for the issue of a patent upon the foregoing survey, the Secretary of the Interior, under date of twenty-ninth December, 1862, rendered his decision, in which, upon recital in substance of the proceedings had in the matter and review, it is held as follows:

44 That "the decree of the district court for the southern district of California, confirming the grant, has become final;" that "the United States has no longer any interest in the controversy;" that "no claim of third parties has been interposed;" that "the suggestions of fraud in the grant, or in the manner of procuring its confirmation, are res adjudicata," and he is unable to discover any reasons why a patent should not be issued in conformity with the decree of the court and the survey, and ordered the issue of "a patent for the land in accordance with the survey as reported by the surveyor-general."

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of Congress, and decisions aforesaid, have given and granted, and by these presents do give and grant unto the said Vicente P. Gomez, and to his heirs, the tract of land embraced and described in the foregoing survey, with the stipulation that said survey, under the aforesaid act of June 2d, 1862, shall be taken as *prima facie* evidence only of the true location of the land granted," and with the further stipulation that, in virtue of the 15th section of the said act of March 3d, 1851, the confirmation of this said claim and

45 this patent "shall not affect the interests of third persons."

To have and to hold the said tract with the appurtenances unto the said Vicente P. Gomez, and to his heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof, I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

[L. S.] By the President: ABRAHAM LINCOLN.
By W. O. STODDARD,
Secretary, Acting Recorder of the General Land Office.

Exhibit No. 2.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 24, 1873.

I, Willis Drummond, Commissioner of the General Land
46 Office, do hereby certify that the annexed is a full, perfect, and literal transcript of pages 312 to 321, inclusive, of volume 4, a book kept in this office for the recording of patents for California land claims;" those portions of said pages which are written in black ink being here written in black ink, those portions which are written in red ink are here written in red ink, and those portions which are written in pencil being here written and represented with blue ink. And I further certify that the original instrument set forth in the above-named pages of said volume four was never executed by the President of the United States, nor delivered to the grantee, and that said original instrument is now on file in this office but neither it nor the copy thereof in said volume four is regarded or treated as a part of the office records of the General Land Office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] WILLIS DRUMMOND, *Commissioner.*

UNITED STATES OF AMERICA:

47 To all to whom these presents shall come, greeting: Whereas, it appears from a duly authenticated transcript, filed in the General Land Office of the United States, that pursuant to the provistons of the act of Congress approved the third day of March, one housand eight hundred and fifty-one, entitled "An Act to ascertain and settle the Private Land Claims in the State of California," Vicente P. Gomez, as claimant, filed his petition on the ninth day of February, 1853, and the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition he claimed the confirmation of his title to a tract of land called Panoche Grande, of the extent of four square leagues, situated in the county of San Joaquin, and state aforesaid; said claim being founded on a Mexican grant to the petitioner, made in the year 1844, by Manual Micheltorena, then governor of Upper California:

And whereas, the board of land commissioners aforesaid, on the sixth day of March, 1855, rendered a decision rejecting said claim, which decree or decision was, on appeal, reversed by the district court of the United States for the southern district of California, by decree rendered as follows:

48 "Vicente P. Gomez, appellant, vs. The United States, appellee; case No. 393. Panoche Grand. Transcript No. 559.

Decree. This cause came on to be heard on appeal from the decision of the United States board of land commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved March 3, 1851, on a transcript of the decision and proceedings of said board, and the papers and evidence upon which said decision was made, and the other evidence adduced by the appellant before this court, and it appearing to the court that said transcript and notice of intention to appeal have been duly filed according to law, and counsel for the respective parties having been heard, it is ordered, adjudged, and decreed that the decision of said board of land commissioners be, and the same is hereby, reversed; and that the claim of said appellant is good and valid; and the same is hereby confirmed to him as follows, to wit: the tract of land situated in the county Fresno, State of California, known by the name of Panoche Grande, bounded northerly by the lands of Don Julian Ursua, southerly by the hills, easterly by the valley of the Tulare, and westerly by the lands of Don Francisco Arias, containing four
49 square leagues of land and no more, provided that quantity is contained within the boundaries aforesaid, and provided also that if a less quantity is contained within the boundaries aforesaid, that confirmation of such less quantity is hereby made to said claimant, and for a more particular description of which said land reference is hereby made to the map contained in the transcript in this case."

"And it also appearing to this court that heretofore, to wit: on the fifth day of June, A. D. 1857, at a regular term of the court, holden in the town of Monterey, State of California, the claim of the appellant in this case has been confirmed by this court, but that it had been omitted by this court to sign the decree of confirmation at the time the same was made, it is therefore further ordered by this court that the same be signed now as for then.

"Given under my hand, in open court, this 5th day of February, A. D. 1858.

"ISAAC S. K. OGIER,
"*U. S. Dist. Judge for the S. Dist. of Cal.*"

And whereas it further appears from a duly certified extract on file in the General Land Office, from the minutes of the Supreme Court of the United States, that this cause being brought
50 by appeal before the said court at the December term, 1858, the following proceedings were had therein: "Now on this day this cause coming on to be heard, the parties appearing by their respective attorneys, the appellant by Sloan & Hartman, esqs., and the appellees by P. Ord, U. S. dist. atty., and after argument of counsel aforesaid, the same is submitted to the court for final adjudication. Whereupon the court, being fully advised in the premises, delivered its opinion confirming the claim of the appellant to the extent called for in the transcript and papers, three leagues or sitios

de ganada major, and a decree was ordered to be entered up in conformity to said opinion;" and thereafter, to wit: at the December term, 1859, of the Supreme Court of the United States, the following order was made in this case: "The United States, appts., vs. Vicente P. Gomez, appeal from the district court of the United States for the southern district of California."

"On consideration of the motion made in this cause on a prior day of the present term, to wit: on Friday, the 27th day of January, A. D. 1860, by Mr. Attorney-General Black, to rescind the order and decree of this court of the 31st day of January, 1859, docketing and dismissing this appeal, and to revoke and cancel the
51 mandate issued by this court to the district court of the United States for the southern district of California, and of the argument of counsel thereupon had as well in support of as against the said motion, it is now here ordered by this court that the aforesaid decree of this court docketing and dismissing this appeal be, and the same is hereby, rescinded and annulled, and that the mandate issued by this court to the district court of the United States for the southern district of California in this case be, and the same is hereby, revoked and canceled; and it is further ordered by this court that the clerk of this court do forthwith send a certified copy of this order to the aforesaid district court of the United States for the southern district of California."

"And whereas it further appears, from a duly certified transcript on file in the General Land Office, that an order having been made in the district court of the United States for the southern district of California, granting a new trial in this case, the said court, on the 4th day of August, 1862, on a motion to vacate and set aside said order, made the following order: 'Vicente P. Gomez, appellant, vs. The United States, appellee, D. C. No. 393, L. C. No. 569.
52 Panoche Grande. On this day the court delivers its opinion in this case, granting the motion heretofore made by the appellant herein, praying the court to vacate and set aside the order of Hon. Isaac S. K. Ogier, late judge, granting a new trial in this cause. And it is hereby ordered that the previous order of this court made and entered on the 21st day of March, 1861, setting aside all proceedings had in this cause and placing the same on the calendar for trial de novo be, and the same is hereby, vacated and set aside.'

"And whereas it further appears from a duly certified transcript on file in the General Land Office of the United States, that an order having been made on the 25th day of August, 1862, in the district court aforesaid, allowing appeal in this case to the Supreme Court of the United States, the said district court at the December term, 1862, made the following order: 'Vicente P. Gomez vs. The United States, No. 393, Panoche Grande. In this case the court delivered an opinion on the motion submitted the day before yesterday, and ordered that the appeal taken on the twenty-fifth

day of August, A. D. 1862, by the United States to the Supreme Court of the United States, from the final decree of confir-
53 mation herein, be vacated and set aside; and it is further ordered that the order of this court made on the said 25th day of August, A. D. 1862, allowing said appeal be, and the same is, vacated and set aside; and the motion of the United States district attorney for leave to take an appeal on behalf of the United States to the Supreme Court of the United States from the said final decree be, and the same is, denied.'

"And whereas there has been presented to the Commissioner of the General Land Office a plat, with a certificate of the survey of the said claim, authenticated by the signature of the surveyor-general of the public lands in California, said survey having been made pursuant to the act of Congress approved June 2, 1862, entitled 'An Act for the survey of grants or claims of land;' said plat and certificate being in the words and figures following, to wit:

"UNITED STATES SURVEYOR-GENERAL'S OFFICE,
"SAN FRANCISCO, CALIFORNIA.

"Under and by virtue of the provisions of the act of Congress of the second of June, 1862, entitled 'An Act for the survyey of grants or claims of land,' and, in consequence of a certificate of the United States district court for the southern dist. of California, a
54 copy of which is hereto annexed, by which it appears that a decision of the said district court has been had, recognizing and confirming the title claim of Vicente P. Gomez to the tract of land designated 'Panoche Grande,' the said tract has been surveyed in conformity with said decision, and I hereby certify the annexed map to be a true and accurate plat of said tract of land, as appears by the field-notes of the survey thereof, made by E. H. Dyer, deputy surveyor, in the month of July, 1862, under the directions of this office, which, having been examined and approved, are now on file therein.

"And I hereby certify that the said tract of land is bounded and described as follows, to wit:

"Beginning at post in earth mound corner to sections one, two, eleven, and twelve, township seventeen south, range eleven east of Mount Diablo meridian, from which post a point on the highest ridge of the Lomas Muertas (a high range of barren and broken mountains, the eastern slope of which forms the western edge of Tulare valley) bears north nine degrees west, distant about two miles.

Thence, according to the true meridian, the variation of the magnetic needle being fifteen degrees thirty minutes east, over rolling land to the north of a small valley called Vallecito, north forty chains to post in earth-mound, on quarter-section cor-
55 ner between sections one and two. Station.

Thence west eighty chains to quarter-section corner, on line between sections two and three. Station.

Thence north forty chains to post in earth-mound corner to sections two and three, on fourth standard line south. Station.

Thence west, at forty chains quarter-section post in earth-mound, eighty chains to post in earth mound corner to sections three and four on fourth standard line south. Station.

Thence through township sixteen south, range eleven east, north forty chains to station.

Thence through middle of sections thirty-three and thirty-two, west one hundred chains to station.

Thence south, at forty chains intersects fourth standard line south twenty chains west of post corner to sections four and five; thence with a variation of fifteen degrees thirty-five minutes east through township seventeen south, range eleven east parallel to its eastern boundary; at sixty chains enters Vallecito valley, course northwest and south of east one hundred chains to station.

Thence east twenty chains to station on line between sections four and five; thence south, at thirty chains leaves small valley; thence over broken hills near southern edge of said valley, sixty chains to quarter-section corner between sections eight and
56 nine. Station.

Thence east eighty chains to quarter-section corner between sections nine and ten. Station.

Thence south forty chains to corner to sections nine, ten, fifteen, and sixteen. Station.

Thence east one hundred and twenty chains to quarter-section corner, between sections eleven and fourteen. Station.

Thence through section fourteen, south sixty chains to station.

Thence east twenty chains to station.

Thence south twenty chains to station on line between sections fourteen and twenty-three.

Thence on section-line east, sixty chains to quarter-section corner on line between sections thirteen and twenty-four. Station.

Thence through middle of sections twenty-four, twenty-five, and thirty-six, over high and rough mountains, south two hundred chains to center of section thirty-six. Station.

Thence east, at forty chains quarter-section post in earth-mound on line between ranges eleven and twelve east; thence through township seventeen south, range twelve east, eighty-two chains and fifteen links to center of section thirty-one. Station.

Thence south, at forty chains quarter-section post in earth-
57 mound on line between townships seventeen and eighteen south, sections thirty-one and six on top of a ridge course northwest and southeast; thence through township eighteen south, range twelve east, two hundred and eighty chains to quarter-section corner between sections eighteen and nineteen. Station.

Thence on section-line, west twenty chains to station.

Thence through section nineteen, south sixty chains to station.

Thence east, twenty chains to station.

Thence south, twenty chains to quarter-section corner between sections nineteen and thirty. Station.

Thence on section-line east, sixty chains to station.

Thence through section twenty, north sixty chains to station.

Thence east, twenty chains to station.

Thence north twenty chains to quarter-section corner, between sections seventeen and twenty. Station.

Thence on section line east twenty chains to station.

Thence through section seventeen, north forty chains to station.

Thence east, twenty chains to quarter-section corner, between sections sixteen and seventeen. Station.

58 Thence on section line, north eighty chains to quarter-section corner, between sections eight and nine. Station.

Thence through section nine east forty chains to centre of section nine, from which the Panoche Grand Peak bears south fifty-six degrees east, distant about seventy chains. Station.

Thence north at forty chains quarter-section post in rock mound, on line between sections four and nine, from which a pine tree bears north fifty-two degrees east, distant twenty-four links, another pine tree bears south fifteen degrees west, distant nineteen links, and the San Carlos Peak, in the northeast quarter of section four, bears north twenty-two degrees east; thence through section four, at fifty-four chains and fifty links across Arroyo Panoche Grande, course northwest sixty chains to station.

Thence east twenty chains to station.

Thence north twenty chains to station.

Thence east twenty chains to quarter-section post in earth mound on line between sections three and four. Station.

Thence on section line, with a variation of fifteen degrees fourteen minutes east, north, at forty chains and forty links intersects

59 line between townships seventeen and eighteen south, range twelve east, at post in earth mound corner to sections three, four, thirty-three, and thirty-four; thence through township seventeen south, range twelve east, over high and broken mountains, with a variation of fifteen degrees thirty-eight minutes east, eighty chains and forty links to quarter-section post in earth mound between sections thirty-three and thirty four. Station.

Thence through section thirty-three, with a variation of fifteen degrees twenty-seven minutes east, west forty chains to center of section thirty-three, from which a marked cedar tree, eight inches diameter, bears west, distant forty chains. Station.

Thence through middle of sections, with a variation of fifteen degrees thirty-eight minutes east, north at forty chains post in earth-mound at quarter-section corner, between sections twenty-eight and thirty-three, one hundred and twenty chains to post in earth mound at quarter-section corner, between sections twenty-one and twenty-eight, two hundred chains to a sandstone twelve inches long, ten inches wide, and eight inches thick, in a rock mound in deep rocky

gulch, from which a steep rock cliff bears north forty-five degrees east; said sandstone is set for quarter-section corner be-
60 tween sections sixteen and twenty-one; thence over alkali hills two hundred and eighty chains to quarter-section post in a mound of alkali soil between sections nine and sixteen. Station.

Thence with a variation of fifteen degrees fifty-nine minutes east, west forty chains to post in mound of alkali soil, corner to sections eight, nine, sixteen, and seventeen. Station.

Thence on section line with a variation of fifteen degrees thirty-eight minutes east, north forty chains to quarter-section post in mound of alkali earth. Station.

Thence through section eight, with a variation of fifteen degrees thirty-eight minutes east, north forty chains to a sandstone rock twelve inches long, ten inches wide, and eight inches thick, in mound of alkali earth, quarter-section corner, on line between sections five and eight. Station.

Thence on section line with a variation of fifteen degrees fifty-four minutes east, west at thirty chains thirty-eight links enters the narrow valley of the Arroyo Panoche Grande at thirty-nine chains eighty-eight links across Arroyo Panoche Grande, fifty links wide, course north ten degrees east, thence over low hills, forty chains and thirty-eight links to post in mound at corner to sections
61 five, six, seven, and eight; thence on section line, with a variation of fifteen degrees thirty minutes east, eighty chains and thirty-eight links to quarter-section post in earth mound, one hundred and twenty chains and thirty-eight links to post in earth mound at corner to sections one, six, seven, and twelve, on line between ranges eleven and twelve east; thence through range eleven east one hundred and sixty chains and thirty-eight links to quarter-section post in mound two hundred chains and thirty-eight links to point of beginning, containing seventeen thousand seven hundred and sixty-eight and seventy-seven one-hundredths acres, and being designated in the plat of public surveys as lot number thirty-seven, township sixteen south, range eleven east; lot number thirty-seven, township seventeen south, range eleven east; lot number thirty-seven, township seventeen south, range twelve east, and lot number thirty-seven, township eighteen south, range eleven east, all of Mount Diablo meridian.

"In witness whereof I have hereunto signed my name officially, and caused the seal of my office to be attached, at the city of San Francisco, this eleventh day of September, one thousand eight hundred and sixty-two.

[SEAL.] "E. F. BEALE,
"*U. S. Surveyor-General, California.*"

62 And whereas application having been made for the issue of a patent upon the foregoing survey, the Secretary of the Inte-

rior, under date of twenty-ninth December, 1862, rendered his decision, in which, upon recital in substance of the proceedings had in the matter and review, it is held as follows: That "the decree of the district court for the southern district of California, confirming the grant, has become final; that the United States has no longer any interest in the controversy;" that "no claim of third parties has been interposed;" that "the suggestions of fraud in the grant, or in the manner of procuring its confirmation are res adjudicata, and he is unable to discover any reason why a patent should not be issued in conformity with the decree of the court and the survey, and ordered the issue of a patent for the land in accordance with the survey as reported by the surveyor-general."

Now, know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the acts of Congress and decisions aforesaid, have given and granted, and by these presents do give and grant unto the said Vicente P. Gomez, and to his heirs, the tract of land embraced and described in the
63 foregoing survey, with the stipulation that said survey, under
64 the aforesaid act of June 2d, 1862, shall be taken as prima facie evidence only of the true location of the land granted, and with the further stipulation that, in virtue of the 15th section of the said act of March 3d, 1851, the confirmation of this said claim and this patent shall not affect the interest of third persons. To have and to hold the said tract with the appurtenances unto the said Vicente P. Gomez, and to his heirs and assigns forever, with the stipulations aforesaid.

In testimony whereof, I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh.

By the President:

[L. S.] ABRAHAM LINCOLN.

Not signed

By W. O. STODDARD, *Secretary,*
Acting Recorder of the General Land Office.

(Findings endorsed:) Filed Nov. 15th, A. D. 1873.
C. FINLEY, *Clerk.*
By M. H. GAY, *Deputy Clerk.*

65 *Judgment.*

(Title of court and cause.)

September term, A. D. 1873.

Present, Hon. David Belden, Judge.

This action came on regularly for trial, before the court, without a jury, a trial by jury having been expressly waived by the parties.

Whereupon the plaintiff introduced his evidence and made his proofs, and the evidence being closed the said action was submitted to the court for decision.

And after due deliberation thereon, the court made and filed its findings and decision in writing, and ordered that judgment be entered in favor of the defendant, in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and considered that the plaintiff take nothing by his said action, and that the defendant go hence without day.

And it is further ordered and adjudged that the defendant do have and recover of and from the plaintiff his costs, amounting to the sum of $282.

Judgment rendered November 15th, 1873.

C. FINLEY, *Clerk.*
By M. H. GAY, *Deputy Clerk.*

66 *Notice of Appeal.*

(Title of cause.)

Please take notice that the above-named plaintiff hereby appeals to the supreme court of the state of California, from the judgment rendered or entered in said cause, in favor of said defendant, and against said plaintiff, and from the whole thereof.

Dated this first day of December, A. D. 1873.

B. S. BROOKS,
Attorney for Plaintiff.

To the clerk of said court, and S. M. Wilson, Esq., attorney for defendant.

(Endorsed:) Filed Dec. 2, 1873.

(Copy of above notice of appeal endorsed:) The within is a copy of notice of appeal this day filed.

B. S. BROOKS,
Attorney for Plaintiff.

I admit service of the within and foregoing, at San Francisco, this second day of December, A. D. 1873.

S. M. WILSON,
Attorney for Defendant.

Filed December 2, 1873.

67 *Clerk's certificate.*

(Title of court and cause.)

I, Cornelius Finley, county clerk of the county of Santa Clara, and the ex-officio clerk of the district court of the twentieth judicial district of the state of California, in and for the county of Santa Clara, do hereby certify that the foregoing are full, true, and correct copies of the original papers on file in my office, and records in the above-entitled cause; that the same constitute the transcript on the appeal of said plaintiff to the supreme court of the state of California, from the judgment heretofore rendered in said action.

And I further certify, that the undertaking on appeal, required by law, has been duly filed.

In witness whereof, I have hereunto set my hand and affixed the seal of said district court, this 12th day of December, A. D. 1873.

[SEAL.] C. FINLEY, *Clerk.*

68 In the supreme court of the state of California.

WM. McGARRAHAN
vs.
THE NEW IDRIA MINING CO.

CITY AND COUNTY OF SAN FRANCISCO.

Edward J. M. Armstrong, being duly sworn, deposes and says: I served the transcript on appeal in the above-entitled cause on S. M. Wilson, esq., attorney for defendants, on the 15th day of December, A. D. 1873, by leaving a copy thereof in the office of said Wilson with a clerk in said office. Said office then being open and said Wilson absent therefrom.

EDWARD J. M. ARMSTRONG.

Subscribed and sworn to before me, this sixteenth day of December, A. D. 1873.

{ NOTARY'S SEAL. } RANSON DE ZALELO, *Notary Public.*

70 STATE OF CALIFORNIA,
OFFICE CLERK OF SUPREME COURT,
SAN FRANCISCO.

I, Grant I. Taggart, clerk of the supreme court of the state of California, do hereby certify that the preceding and annexed contains a full, true, and correct copy of the original transcript, filed December 17th, 1873, in the matter of Wm. McGarrahan, appellant, vs. The New Idria Mining Co., respondent, as shown by the records of my office.

In witness whereof, I have hereunto set my hand and the seal of said supreme court, at the city of San Francisco, State of California, this 22d day of March, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk.*
By ALLEN TILLINGHAST, *Deputy Clerk.*

71 In the supreme court of the state of California.

WILLIAM McGARRAHAN, APPELLANT,
vs.
THE NEW IDRIA MINING COMPANY, RESPONDENT. } October Term, 1874.

Filed December 26th.

McGARRAHAN
vs.
THE NEW IDRIA MINING CO. } No. 4,091.

For the purposes of this decision only, we shall consider the rec-

ord in the volume in the General Land Office at Washington, kept for the recording of patents of the United States, issued upon California confirmed Mexican grants, as constituting the original patents.

The patent is evidence of the series of proceedings recited in it; and as the deed of the United States took effect by relation as of the date of the presentation of the petition for confirmation of the
72 grant to the board of land commissioners.—(Leese vs. Clark, 18 Cal., 535.) Indeed, it is only by virtue of this application of the doctrine of relation that the plaintiff can hope to recover, since his deed from Gomez, the original grantee, only purports to convey "the right, title, and interest" of Gomez, the date of the conveyance, which preceded several years that of the alleged patent (Gee vs. Moore, 14 Cal., 472; Kemball vs. Semple, 25 Cal., 440; Morrison vs. Wilson, 30 Cal., 344); the patent, as we have seen, is not only the deed of the United States—it is evidence of the proceedings recited in it, and a solemn record of the government of its action and judgment with respect to the title of the claimant. As such it imports absolute verity.—(Thompson vs. Teschemacher, 18 Cal., 11.) It follows that both the officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent. Neither the President, however, nor any officer has other power to dispose of the public domain, or to sign, or cause the seal of the land office to be
73 affixed to patents, than such as is conferred by statutes of the United States.—(Barker vs. Duff, 47 Cal., 554.)

Under the act of Congress of 1851, "to ascertain and settle private land claims in California," a patent can only issue after the final confirmation of a Mexican grant. While, therefore, the recitals of fact are binding on all concerned, an opinion of the executive officers in respect to matters of law, as indicated either by the ultimate act of issuing the patent or by recitals inserted in that instrument, is not, and from the nature of the powers and duties of such officers, cannot be conclusive.—(Foscalina vs. Doyle, 47 Cal., 437.)

It appears from the alleged patent that on the 25th of August, 1862, an order was made in the district court allowing an appeal to the Supreme Court of the United States in the case of The United States vs. Gomez; and that at the December term, 1862, the district court made an order purporting to set aside the order of the 25th August.

74 The order of the 25th day of August, 1862, was valid and effectual to transfer the cause to the Supreme Court of the United States for final disposition, subject only to the appeal being dismissed for want of prosecution, without prejudice to a new appeal within five years after the decree of the district court.—(United States vs. Gomez, 3 Wall., 673; McGarrahan vs. Maxwell, 28 Cal., 89.) It does not appear in the patent, nor in the findings of the court below, that any disposition has been made of the appeal of the

25th of August by the Supreme Court of the United States. On the appeal being granted by the district court, the jurisdiction of the Supreme Court attached, and the appeal could be dismissed only on application to the Supreme Court. The district court could not, just before the expiration of the five years, set aside its order granting an appeal, and thus deprive a party of a sacred right guaranteed by the statute. An appeal constitutes a bar to the execution of the judgment of the inferior court.—(United States vs. Pacheco,
75. 20 How., 263.) Its effect is to suspend all proceedings in the court below.—(Thornton vs. Mahoney, 24 Cal., 569; McGarrahan vs. Maxwell, supra.) It must be effectual to prohibit any action of the district court setting aside an order which has already operated to transfer the cause to the appellate tribunal.

The claim to the rancho "Panoche Grande" was not finally confirmed, therefore, when the alleged patent was issued, and the same is void.

Judgment affirmed.

McKINSTRY, *J.*

We concur:

RHODES, *J.*

NILES, *J.*

CROCKETT, *J.*

Wallace, C. J., being disqualified, did not sit in this cause.

I, Grant I. Taggart, clerk of the supreme court of the state of California, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion deliv-
76 ered in the above entitled cause, on the 26th day of December, A. D. 1874, and now on file in my office.

Witness my hand and the seal of the court, this 3d day of March, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk.*
By ALLEN TILLINGHAST, *Deputy.*

77 Know all men by these presents, that we, Wm. McGarrahan, L. Esberg, and Ebon C. Ingersoll, are held and firmly bound unto The New Idria Mining Company in the full and just sum of five hundred dollars to be paid to the said The New Idria Mining Company, certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this fourth day of February, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at a supreme court of the state of California, in a suit depending in said court, between William McGarrahan, plaintiff, and The New Idria Mining Company, defendant, judgment was rendered against the said plaintiff; and the said plaintiff having obtained a writ of error and filed a copy thereof in the

clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such, that if the said William McGarrahan shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sgd.) WM. McGARRAHAN, [L. S.]
(Sgd.) L. ESBERG, [L. S.]
(Sgd.) EBON C. INGERSOLL, [L. S.]

Sealed and delivered in presence of—
S. BIEN.
W. G. FORD, witness as to Ebon C. Ingersoll.
Approved by—
FIELD, *J.*

78 In the supreme court of the State of California.

I, Grant I. Taggert, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a bond filed on the 27th day of February, A. D. 1875, in the matter of William McGarrahan vs. The New Idria Mining Company, as shown by the records of my office.

Witness my hand and the seal of the court, this 22d day of March, A. D. 1875.

[SEAL.] GRANT I. TAGGERT, *Clerk*,
by ALLEN TILLINGHAST, *Deputy Clerk.*

79 The United States of America to the New Idria Mining Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the state of California, wherein William McGarrahan is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States, this fifth day of October, in the year of our Lord one thousand eight hundred and seventy-five.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Ct.

80 (Endorsed:) In the Supreme Court of the United States.
William McGarrahan vs. The New Idria Mining Company.

Citation.

Service of a copy of the within citation on the 25th day of February, A. D. 1875, is hereby admitted.

S. M. WILSON,
Atty. for the New Idria Mining Company.

Served 1st March, 1875.

THOMAS BELL,
Pesident New Idria Mining Co.

81 In the supreme court of the state of California, October term A. D. 1874.

WILLIAM McGARRAHAN, APPELLANT, *vs.* THE NEW IDRIA MINING CO., RESPONDENT. } On appeal from the district court of the 20 judicial district, in and for the county of Santa Clara.

And now at this day this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by McKinstry, *J.*, Rhodes, Niles, and Crockett, *JJ.*, concurring.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment of the district of the
82 20th judicial district, in and for the county of Santa Clara, in the above-entitled cause be, and the same is hereby, affirmed with costs.

I, Grant I. Taggart, clerk of the supreme court of the state of California, do hereby certify that the foregoing is a true copy of an orginal judgment entered in the above entitled cause on the 26th day of December, A. D. 1874, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at my office this 3d day of March, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk.*
By ALLEN TILLINGHAST, *Deputy.*

(Endorsed:) No. 4,091. In the supreme court state of California. Remittitur. McGarrahan vs. New Idria Mining Co. Clerk's costs $15. Paid by appellant $15. Paid by respondents ——. Total $15. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

(Endorsed:) California sup. court. No. 303. William McGarrahan, plaintiff in error, vs. The New Idria Mining Company. Filed 8th May, 1875.

IN THE

Supreme Court United States.

No. 72.

WILLIAM McGARRAHAN

vs.

THE NEW IDRIA MINING COMPANY.

Error to the Supreme Court of the State of California.

Brief of MONTGOMERY BLAIR, of Counsel for the Plaintiff in Error.

STATEMENT AND ASSIGNMENT OF ERROR.

Thomas McGill & Co., Printers, Washington, D. C.

In the Supreme Court of the United States.

No. 72.

WM. McGARRAHAN

vs.

THE NEW IDRIA MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF MONTGOMERY BLAIR, OF COUNSEL FOR THE PLAINTIFF IN ERROR.

STATEMENT AND ASSIGNMENT OF ERROR.

This is an action of ejectment, brought by the plaintiff in error, in a District Court of the State, to recover the land in question. By consent of parties, the case was tried by the court, which found against the title exhibited by the plaintiff, and gave judgment for the defendant, setting forth, in special findings, the facts established by the plaintiff. The fourth finding, (p. 11, see pp. 12 to 19, inclusive, of Transcript,) sets forth a patent from the United States for the land, under which the plaintiff claimed title, and it is of *the decision of the Supreme Court of the State against the validity of this patent that the plaintiff complains, and here assigns for error that decision.*

The paper set forth in the finding is a copy of the record of

a patent dated 14th March, 1863. The certificate of the Commissioner of the General Land Office, attesting this to be a true copy from the proper record-book of patents for private land claims of that date, is dated 24th March, 1873. The additional statement incorporated in that certificate, to the effect that the original was never executed by the President, as the copy shows it to have been, was by the District Court held to be unauthorized and of no effect. And the similar statement which a former Commissioner had written across the face of the record, under date of the 25th of July, 1870, and which the Commissioner of 1873 caused to be copied across the face of the copy of the patent delivered to the plaintiff, and which was by him exhibited in evidence, was in like manner treated as a nullity by the Supreme Court of the State; but that court, upon a recital in the body of the patent itself, held that it was illegally issued.

The patent recites that a petition was presented, claiming the land in question, under the act of 3d March, 1851, before the California Land Commission, by Vicente P. Gomez; that the Commissioners rejected the claim on 6th March, 1855; that on appeal, the District Court made a decree, dated the 5th day of June, 1857, confirming the claim; that on appeal to the Supreme Court, at the December Term of 1858, the following proceedings were had therein:

"Now, on this day, this cause coming on to be heard, the parties appearing by their respective attorneys, the appellant, by Sloan & Hartman, esqs., and the appellees by P. Ord, United States District Attorney, and after argument of counsel aforesaid, the same is submitted to the court for final adjudication; whereupon the court, being fully advised in the premises, delivered its opinion confirming the claim of the appellant to the extent called for in the transcript and papers, three leagues, or *sitios de ganada major*, and a decree was ordered to be entered up in conformity with said opinion."

That at the subsequent term of said court, on the 27th January, 1860, an order was made rescinding the order of 31st January, 1859, docketing and dismissing an appeal; that on the 21st day of March, 1861, a new trial of the cause was ordered in the District Court; that an order was

afterwards made by said court on the 4th day of August, 1862, setting said order aside; that at the December Term of said District Court, of 1862, an order was made setting aside an appeal to the Supreme Court of the United States, which the order recites had been granted on the 25th of August of that year, and overruling a motion then made for the allowance of an appeal to the Supreme Court of the United States.

The patent also recites that a survey in due form of law had been made by the United States Surveyor General for California, and approved by him September 11, 1862, and forwarded to the Commissioner of the General Land Office with an application by the claimant for the patent; and that the Secretary of the Interior had decided on the 29th day of December, 1862, that the decree of the District Court, confirming the land, had become final, and had ordered the patent to issue.

The recital in the patent, that an appeal had been allowed by the District Court to the Supreme Court of the United States on the 25th August, 1862, is, in the opinion of the Supreme Court of the State, fatal to the patent, although the patent also recites that the District Court which granted that appeal, had set it aside at a subsequent term, the Supreme Court of the State holding that the District Court had not the power to set aside the appeal, and that the effect of the recitals is to show that an appeal was pending at the time the patent issued, which in the opinion of that court, under such circumstances, the act of 1851 forbade.

ARGUMENT.

Three objections were made below to plaintiffs' title: *First*, That adopted by the court as above stated; *Second*, That a copy of the record of a patent was not evidence of a grant when the commissioner, in certifying to the copy, certified also that the original had not been executed; *Third*, That the patent was not countersigned. These questions will be here considered in the order stated, and some authorities submitted

additional to those in plaintiffs' brief filed in the State Court. Copies of that are herewith presented to this court, and are referred to here as "brief."

I. The opinion of the State Court assumes that the recitals contained in the Patent must sustain the decision of the Land Department, that there has been a final confirmation of the land, which the patent declares, to make the patent valid. This is clearly erroneous. The law does not require any recital whatever to be inserted in the patent. The act provides only that "a patent shall issue to the claimant upon his presenting to the Commissioner of the General Land Office an authentic certificate of such confirmation, and a plat or survey of the land duly certified by the Surveyor General of California." (13th sec. act of 1851, 9 Stat., p. 53) This does not require that such certificate to be presented to the Commissioner shall either be stated or inserted in the patent. It requires only that what he shall decide to be such a certificate shall be presented to the Commissioner. He is to be satisfied that such confirmation has been had by what he shall adjudge to be an authentic certificate, and thereupon he is authorized to issue the patent. How he was satisfied, or that he was properly satisfied, need not appear.

Patents would be very insecure evidence of title, if the validity of the grant depended upon the opinion of the Commissioner of the General Land Office as to what was necessary to be recited as the ground of issuing them. In other words, if the reasons for his judgment were open to question, and if insufficient, invalidated his judgment. The statement of the manner in which the Commissioner was satisfied to give the patent, which is all the recitals amount to, is not more essential to the validity of the patent than the reasoning of a court is to the validity of its judgment, and it is well settled that, "*if the court has jurisdiction, its* judgment cannot be impeached collaterally for errors of law or fact, though they appear on the face of the record." (Read *v.* Gardner, October Term, 1870; Whitwell *v.* Barbier, 7 Cal., 54; Waugh *v.* Chauncey, 13 Cal., 11; 14 Cal., 129; 20 Cal., 233; 16 Cal., 385; 16 Cal., 69.)

Hence, a grant, under the act of 1851, would be as complete, if the patent merely stated that it was made in pursuance of that act, as if all the initiatory proceedings in all the courts, required by the act, were set out in the patent at length.

"The act does not *distinguish the patents, so issued, from other patents issued by the United States.*"

Morse *v.* Swan, 17 Cal., 199.
Leese *v.* Clark, 18 Cal., 535.

Nothing could be more useless than would be such a setting forth in a patent, or than are the tedious recitals of these proceedings with which these instruments are usually incumbered; for, should any question arise as to the proceedings, the copies or recitals in the patent would be of no effect as evidence of them, but duly certified copies would be required.

Hence, the State court errs in saying, p. 30, "That the recital of facts in the patent is binding on all concerned." And the court itself shows that this is an error, by proceeding to say, "That *an opinion* of the executive officer in respect to matters of law, as indicated by the ultimate act of issuing the patent, or by *recitals inserted in that instrument*, is not, and, from the nature of the powers and duties of such officers, cannot be conclusive."

It is manifestly contradictory to say, as the court does here, that the recitals of fact, contained in the patent, made by an executive officer, are conclusive, but that the *judgments* of the officer, indicated by such recitals, are not conclusive. No such distinction between the recitals, as recitals of fact, and as indications of judgment, exist. All the recitals of fact, which the court here says are conclusive as facts, but are not so as indications of the judgment of the officer, are but indications or declarations of the judgment of the executive officer as to the legal effect of the instruments referred to. Thus, the recitals, that an appeal was allowed on the 25th August, 1862, relied on to show that the patent ought not to have issued, is but the judgment of the officer as to the legal effect of an order of court, and it is a judgment which, the court properly says, is not conclusive.

additional to those in plaintiffs' brief filed in the State Court. Copies of that are herewith presented to this court, and are referred to here as "brief."

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It is manifestly contradictory to say, as the court does here, that the recitals of fact, contained in the patent, made by an executive officer, are conclusive, but that the *judgments* of the officer, indicated by such recitals, are not conclusive. No such distinction between the recitals, as recitals of fact, and as indications of judgment, exist. All the recitals of fact, which the court here says are conclusive as facts, but are not so as indications of the judgment of the officer, are but indications or declarations of the judgment of the executive officer as to the legal effect of the instruments referred to. Thus, the recitals, that an appeal was allowed on the 25th August, 1862, relied on to show that the patent ought not to have issued, is but the judgment of the officer as to the legal effect of an order of court, and it is a judgment which, the court properly says, is not conclusive.

It may be that the officer was mistaken in his judgment as to the effect of that order. He may have overlooked conditions contained in it, or stipulations in the record which required and authorized its revocation. But it is enough that it is a recital which the law does not require to be made to make it inoperative for any purpose. (Greenleaf, §§ 113, 498; Perry *v.* Black, 1 Mo., 344; Randall *v.* Bradbury, 30 Me., 258; State *v.* Governor, 1 Dutcher R., 331; Tilman *v.* Long, 29 Ala., 378; Hastings *v.* Dowlin, 40 Cal., 364.) The case of Fostener *v.* Doyle, 47 Cal., 437, cited by the court, which holds that *the decision of the executive officer, in issuing the patent*, gives the patentee a legal title, though not one which is absolutely conclusive in all cases, directly antagonizes its decision in this case.

But the court mistakes altogether the legal effect of these recitals. The record before it did not show that the Supreme Court of the United States entertained jurisdiction of the so-called appeal, taken on the 25th August, 1862, and it cannot be assumed that any such appeal existed, in the face of the decision in the record by the Secretary of the Interior and by the District Court, that it did not, and that the order allowing it was void, and that the Supreme Court of the United States had no jurisdiction over the case. The case of Roberts, 15 Wall., p. 384—a case in all respects like this—sustains this view. Moreover, the only evidence furnished by the recitals of the patent, that an appeal had been allowed, is contained in a recital of an order rescinding the allowance of an appeal. Is there any justification for the assumption, in the absence of the record, and in entire ignorance of all the facts, that this action of the court, taken with all the facts before it, was irregular and void? The effect of the recitals in the patent is, that it was decided by competent authority that there was no appeal; that the decree of confirmation had become final; and that this decision was never reversed or attempted to be reversed.

And the court overlooked entirely the recital that a final decision was made by the court at the December term of 1858, affirming the decision of the District Court of the 5th June, 1857, finally confirming the grant to the claimant. The

patent does not recite that the case was then docketed and dismissed, but that it was heard on its merits, and its merits decided after argument of counsel; and the judgment then rendered, according to the recitals of the patent. It nowhere appears that this final judgment has been set aside; and if the action of the court at a subsequent term could be held to relate to this judgment, it could certainly not be held that the court could have set aside a final decree rendered by it at a former term on motion. The State court rules this point, in holding that the District Court could not set aside the appeal granted by it at a former term.

Again, the court holds the patent to be void on its face, in a collateral proceeding, because the facts recited in it do not authorize its issue, in the opinion of the court. This is the identical case put by the court in Doll *v.* Meader, 16 Cal., 325, where the court says: "If the authority to issue the patent depend on the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them, and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequent from the same source, much less by those who show no color of title in themselves." This is manifestly just that case, and not within either of the classes in which a patent can be held to be void on its face. These are, as stated by the court, (1st) "In the absence of legislation directing the disposition of the property;" (2d) "Where the officer acting is not invested with power;" or, (3) "When an estate is prohibited." In Clark *v.* Leese, 18 Cal., 535, the court says: "The patent is the final act on the part of the Government resulting from such inquiries, *and as to all matters of fact and law* essential to authorize its issuance *it imports absolute verity.*" In Johnson *v.* Towsley, 13 Wall., 72, the court repeats: "The general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its

duties, the decision of that tribunal within the scope of its authority is conclusive upon all others," and says, "that the action of the land office in issuing a patent for any of the public land subject to sale or *otherwise*, is conclusive of the legal title, must be admitted, under the principle above stated; and in all courts and in all forms of judicial proceedings, where this title must control, either by the reason of the limited powers of the court, or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

Nor is a mere intruder permitted to question the validity of the acts of officers of the Government acting within the general scope of their authority, even when their acts are void. Thus, it is held that a patent cannot be assailed in an action of ejectment by a defendant who pretends to no title in himself, on the ground that the proceeding which culminated in the patent took place at a time when by law such proceedings were irregular and illegal. (Sarpy *v.* Papin, 7 Mo., 506.) In that case the land was forbidden by law to be sold at the time of the entry, so that even if this case came within the three classes enumerated in Doll *v.* Meader, where the patent would be held void when questioned by a party claiming by title subsequent, the defendants in this case could not avail themselves of the defect, having themselves no title whatever. (See also Crommelin *v.* Minturn, 9 Ala., 596; People *v.* Mauran, 5 Denio, 398; Sutton *v.* Meurer, 6 B. Mon., 438; Taylor *v.* Fletcher, 7 B. Mon., 83.)

II. The case of LeRoy *v.* Jamieson and others, decided by the Circuit Court of the United States for the District of California, is directly in point upon the second question. The court, Mr. Justice Field, delivering the decision, says:

"The Commissioner appears to have given controlling weight, in overruling the action of his predecessor, to the certificates of Surveyors General Mandeville and Beale and a clerk of the United States District Court. The certificates were *prima facie* evidence; and before the patent issued, and afterwards, if the patent was properly recalled, the Commissioner was at liberty to go behind them, and inquire whether notices had been in fact published, as there stated. The cer-

tificate of Surveyor General Beale, as to the publication, was of matters not within his personal knowledge; and the same may be said of the certificate of the clerk, so far as the acts of the Surveyor General and his publications were concerned; as to them, it was without any value whatever. The clerk can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases; but that is the extent of his authority. His certificate would have been just as valuable as evidence had it related to the acts of the Commissioner himself; and yet the Commissioner twice refers to it as having some potentiality in the matter.

"But aside from all considerations of this kind, the case cannot be disposed of by any judgment we may form of the evidence which controlled Commissioner Wilson. We have commented on that evidence because, upon its supposed insufficiency, Commissioner Drummond justified his attempted annulment of the action of his predecessor and the cancellation of the second patent. If the patent of 1866 could be recalled at all, the sufficiency of that evidence is not a subject for consideration in this form of action, any more than the sufficiency of the evidence upon which any other step in the progress of the proceedings for a patent was taken. As we have already stated, it was the duty of the Commissioner, upon receiving a survey transmitted to him as published under the act of 1860, to examine into the regularity and sufficiency of the alleged publication. That was a matter submitted by the law to his determination; and that determination, whether correctly or erroneously made, was conclusive, unless reviewed and corrected, on appeal, by his superior, the Secretary of the Interior. The Commissioner has, undoubtedly, a right, within a reasonable period, upon proper application, to reconsider any matter previously determined by him, but such right must be exercised before proceedings upon the original rulings had been taken and concluded. It would be a dangerous doctrine, creating great insecurity in titles, if the correctness of his action, upon a matter over which he has jurisdiction, could, years afterwards, be annulled by his successor, because of supposed errors of judgment upon the sufficiency of evidence presented to him; and it would be without precedent, against principle, for a court of law, in an action of ejectment upon the patent, to inquire collaterally into the sufficiency of such evidence to justify the action of the Commissioner, and to submit that question to the determination of a jury. The patentee, if such a proceeding were permissible, would find his title established in one case and rejected

in another, according to the varying judgment of different juries.

"It becomes important, therefore, to determine when a patent of the United States for land takes effect; that is, when it becomes operative as a conveyance and binding upon both parties, and under what circumstances it may be recalled after it has passed under the seal of the United States, and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing between acts which bind the Government and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that when the Government is bound, the patentee is bound also, without reference to his assent on the subject. But nothing is further from the fact. No one can be compelled by the Government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the Government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the Government or the deed of an individual, will always be presumed, in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. There is, in this respect, no difference between the patent of the Government and the deed of a private individual.

"The question then, in all cases, is, when is the conveyance in a condition for acceptance by the grantee? What act of the grantor is necessary to place the instrument in a condition for acceptance? When in that condition, its operation is no longer subject to the control of the grantor; that, then, depends on the grantee. The answer to the question is not difficult. If the instrument be the deed of a private individual it is in a condition for acceptance when it is offered for delivery, that is, when the grantor has parted with its possession, or the right to retain it, in order that it may be given to the grantee. (Jackson *v.* Dunlap, 1 Johnson's Cases, 116; Jackson *v.* Phelps, 12 Johns., 418; Jackson *v.* Bodle, 20 Id., 184; Church *v.* Gilman, 15 Wendell, 656; Hulick *v.* Scoville, 4 Gilman, 159; Bullitt *v.* Taylor, 34 Miss., 741.)

"If the instrument be the deed of the Government—that is, its patent—it is in that condition when the last formalities required by law of the officers of the Government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the Land Office. By these acts open and public declaration is made that so far as the General Government is concerned, the title of the premises has been transferred to the grantee. The record stands, in the place of the offer for delivery in the case of a private deed. The instrument is then in a condition for acceptance, and is thenceforth held for the grantee. And so the authorities are, that the grantee, in such cases, takes, by matter of record—the law deeming, as says Mr. Justice Story, speaking for the Supreme Court, 'the grant of record of equal notoriety with an actual tradition of the land, in the view of the vicinage.' (Green *v.* Liter *et al*, 8 Cranch, 247.)

"In case of a private deed, it is essential that the grantor should part with its possession, or the right to retain it; for until then he may alter or destroy it. But not so with the Government deed; with the close of the record, the power of the officers of the Government over the instrument is gone. Whether it thereafter remain in the Land Office, or be transmitted to a local office for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the Land Office.

"But assuming the correctness of this doctrine in cases of ordinary transfers by the Government of property by sale or gift, it is argued by counsel that it has no application to patents issued upon a confirmation of Mexican grants in California. The argument is, that the Government, in dealing with claims to land under these grants, acts as a sovereign over a subject within its exclusive jurisdiction, and that in the discharge of its treaty obligations, it has declared in what manner such claims shall be presented; by what officers their validity shall be tested and location determined, and by what document the result of the proceedings, when favorable to the claimant, shall be authenticated. The patent, it has declared, shall be issued by the Commissioner when its tribunals have adjudged that the claim is valid, and its officers have correctly surveyed it. The claimant, say the counsel, cannot prevent the agents of the Government from performing the duties

which the law has imposed upon them. He is as powerless to prevent the issue of a patent as he was to annul the survey or control the decree. The law commands the Commissioner to issue the patent, and with the discharge of that duty the confirmee cannot interfere. No act of the latter can enlarge or abridge the Commissioner's powers. And hence the efficacy of the patent in these cases does not depend upon the acceptance of the patentee.

"The argument is plausible, but not sound; it proceeds upon the assumption that an acceptance of the patent must be by assent subsequent to its issue. But subsequent assent is not essential. A previous application for a patent is as persuasive evidence of its acceptance as any subsequent assent; that is, if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851; the claimant asks, in effect, that his claim may be recognized, and confirmed by appropriate decree; and then a survey, conforming to such decree, may be made in the mode prescribed by law, and that a patent thereupon be issued to him. When a patent is thus issued, it will take effect without reference to any subsequent action of the patentee. He has, in advance, by his proceedings, signified his acceptance. But, on the other hand, if the patent in such case be issued without a final survey, that is, one determined in the prescribed mode to be conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He asked what the law authorized him to have; and so for as the law is disregarded in the survey, he stands free as to his acceptance of the result. He can, in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged.

"Such was the case with the patent of 1866. It was issued upon the supposition that the survey had become final by proper publication. The owner of the patent insisted that no such publication had been made, and that the survey was not therefore final and binding upon him, and was in fact erroneous, and on that ground refused at once to accept the patent, and asked for a new survey. The Commissioner of the General Land Office was, upon this refusal and petition, at liberty to look again into the alleged finality of the survey —that is, into the sufficiency of the publication—for on no

other ground than its insufficiency could he depart from the survey returned. The proceeding was one between the patentees and the Government; and if the patentees, before accepting the patent, consented that the regular officer of the Government might go behind the record and re-examine the matter which had been by law intrusted to him, and correct an error which had been committed by accident, inadvertence, or otherwise, we do not perceive how any third party can object and assail the second patent on that ground. If the defendants, or other third parties, have superior rights to those of the patentees, they are no more affected by the correction of the error in the survey than they would have been had the error never been committed; and if they have no such superior rights, they cannot upon any just principle of law or morals, contend that the error committed to the injury of the patentees, or their successor in interest, shall be forever irreversible. This is not a case where any doctrine of estoppel for alleged acts or conduct of the parties applies.

"The proceeding is not in principle essentially different from the correction of a deed of a private person. If the deed is accepted when tendered, the transaction is closed, the title has passed, and any subsequent alteration of the instrument or its destruction cannot affect the grantee's title; but if not accepted when tendered, the deed may be corrected by the grantor, until it meets the views of the grantee. The only difference between the two cases arises from the fact, that, whilst the individual grantor is not restricted in his alterations, the officers of the Government, acting under the law, can only, even by consent of the patentee, go behind the record to correct an error committed to his injury, in disregard of rights secured to him by the law.

"The Terrell survey not having become final, and the commissioner being satisfied that it was erroneous, a new survey was properly ordered, under the act of 1864, which was then alone applicable. It is conceded that the subsequent proceedings, including the issue of the patent of 1870, were in accordance with its provisions. Our conclusion is, that the patent of 1866 was lawfully recalled, and that the patent of 1870 was properly issued and is a valid instrument, binding both upon the Government and the patentees and their successor in interest. After it was recorded, the officers of the Government were powerless to change it or cancel it without the consent of its owner. It was then his muniment of title, and he was entitled to its possession whenever demanded."

In support of these views, in addition to the cases cited in the brief, we submit the following:

In the case of Marbury *v.* Madison, the court says:

"If it was necessary, then a loss of the commission would lose the office.

"Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the office of the Secretary of State would be, to every intent and purpose, equal to the original. The act of Congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted, and afterwards lost. *The copy would be complete evidence that the original had existed*, and that the appointment had been made, but not that the original had been transmitted. If, indeed, it should appear that the original had been mislaid in the Office of State, that circumstance would not affect the operation of the copy.

"*When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book, kept for that purpose; may not have been performed.*

"*A copy of this record is declared equal to the original;* and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or, can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

"*Such a copy would, equally with the original, authorize the justice of the peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.*

"It is further enacted, that patents shall be countersigned by the Secretary of State, and recorded in his office. If the Secretary of State should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured person no remedy? It is not believed that any person whatever would attempt to maintain such a proposition."

In an ejectment suit for a tract of land, called Harwood's Lyon, in Talbot county, and containing 400 acres, at the trial of the case the plaintiff, in order to make out his title to the

lands in question, offered to give in evidence to the jury a copy, under seal of the Land Office, of a patent for the lands in question from the lord proprietary to one Thomas Harwood, dated the 12th of February, 1663; whereupon the defendant opposed the said copy being given in evidence, because the original patent, of which the paper offered was a copy, was surrendered and made void; and to prove it, showed in evidence to the court the following entry in the margin of the record of the said patent: "This patent delivered into the land office, and made void. (*Vide* lib. H H, fol. 167.) Another issued in the name of Philip Stevenson, upon resurvey, with addition of 200 acres more in our entire survey." And the defendant insisted that it was the usage and custom of the province, at the time when such surrender was made, to surrender, abrogate, and make void grants for lands in the same manner which the entry in the margin of the record aforesaid purporteth (see *ante*, the case of Diggs *v.* Beale, October Term, 1750;) and showed to the court forty-seven marginal entries in the record of so many patents, between the years 1658 and 1671, of the same purport with that in the margin of the record of the patent in question.

The court were of opinion that the said original patent was annulled and made void, and would not allow the plaintiff to give the said copy of the patent in evidence to the jury; to which opinion the plaintiff excepted, appealed to the Court of Appeals. The Court of Appeals reversed the judgment of the Provincial Court.

III. There are several answers to the objection that the patent was not countersigned.

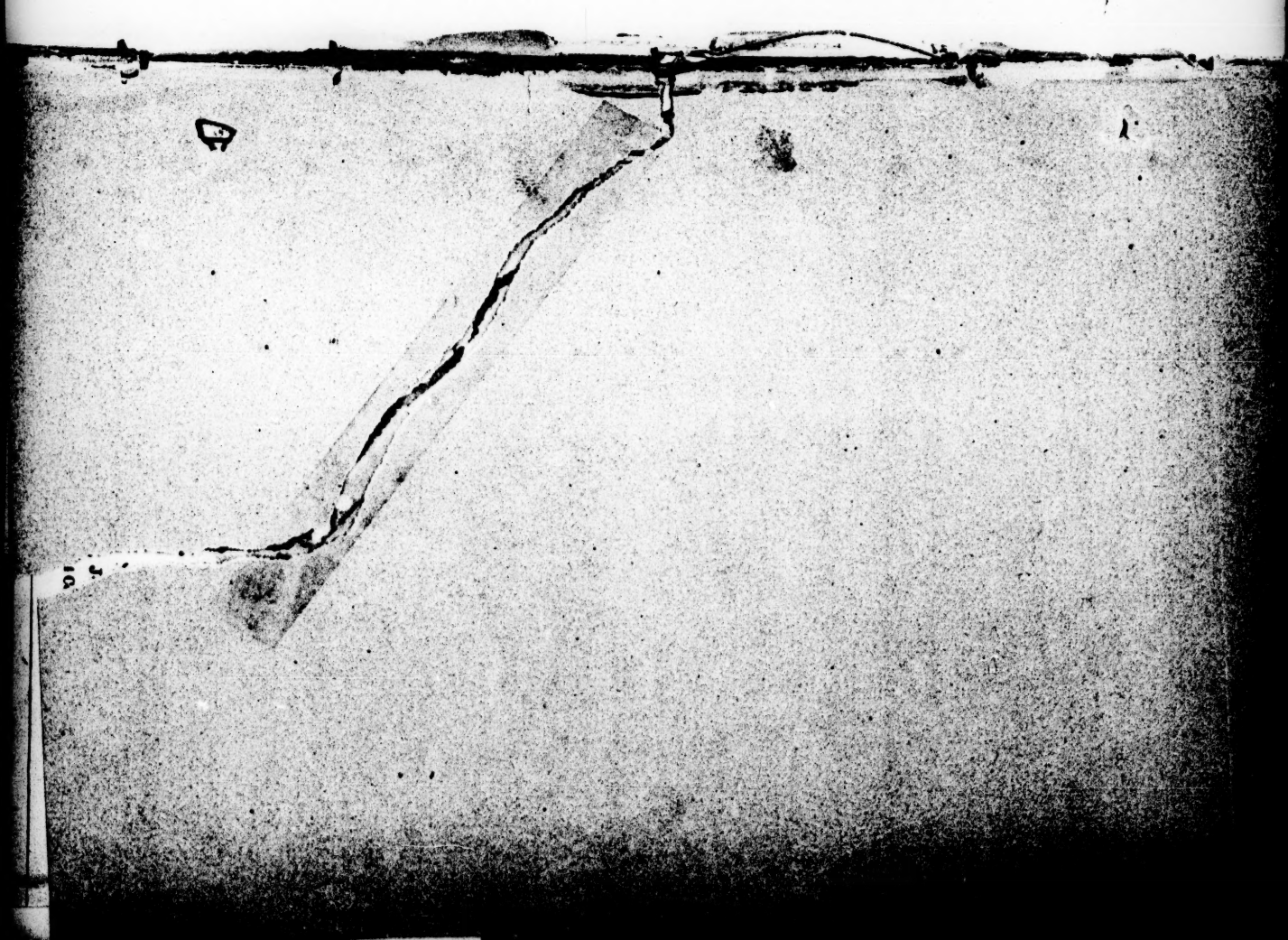
First. The requirement is merely *directory*, and its performance not necessary to the validity of the patent. This is shown by the definition of the word *countersigned*, and the decisions of the courts in many land cases cited in the "brief."

Second. The copy, as indorsed, shows that the original purported to have been countersigned by Mr. Stoddard, as *acting* recorder. The only answer to this is, that the space intervening between Mr. Stoddard's name and the title of

"acting recorder" placed under it, shows that this title was not intended to be attached to his name, and that Mr. S. could not have been "acting recorder," because the law devolved that duty on the chief clerk of the private land claims, in the absence of the recorder. But the fact that the paper was recorded, itself demonstrates that the recorder recognized its completeness. (See Justice Field's opinion, *supra*.)

Third. But if it be conceded that the name of the recorder is omitted in the record, the 1st section of the act of '43, quoted at page 18 of the "brief," cures the defect, by making the mere record of the patent conclusive of its due execution, and copies of such record of the same validity in "evidence as if the names of the officers signing and countersigning the same had been fully inserted in said record."

MONTGOMERY BLAIR.



In the Supreme [illegible]

OF THE

STATE OF CALIFORNIA.

William McGarrahan,

Appellant.

VS.

The New Idria Mining Company,

Respondent.

ABSTRACT OF AUTHORITIES.

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In the Supreme Court

OF THE

STATE OF CALIFORNIA.

WILLIAM McGARRAHAN,

Appellant,

vs.

THE NEW IDRIA MINING COMPANY,

Respondent.

Abstract of Authorities Referred to.

I.

The Patent is Conclusive.

"A patent not void upon its face cannot be questioned either collaterally or directly by persons who do not show themselves to be in privity with a common or paramount source of title."

Doll *vs.* Meader, 16 Cal., 296.

"A patent is the highest evidence of title and is conclusive as against the Government and all claiming under junior patents or titles until it is set aside or annulled by some *judicial* tribunal."

U. S. *vs.* Stone, 2 Wallace, 535.

II.

The Record of the Patent is Evidence as high, if not higher, than the Patent itself, and with the Conveyance from the Patentee, is conclusive of Appellant's Right to Recover.

STATUTES OF THE UNITED STATES AFFECTING THE SUBJECT.

"An act for the establishment of a General Land Office in the Department of the Treasury, April 26, 1812 (2 Statutes at Large, p. 717).

SEC. 1. General Land Office created—Commissioner of Land Office, his duties. SEC. 2. Chief Clerk, his duties, during vacancy. keeps control of seal and records. SEC. 4. Seal to be provided "and copies of any records, books, or papers belonging to said office under the signature of the said commissioner, or when the office shall be vacant under the signature of the chief clerk and the said

seal shall be competent evidence in all cases in which the original records, books, or papers shall be evidence." SEC. 5. Commissioner to have custody of seal, records, etc.

SEC. 8. "That all patents issuing from the said office shall be issued in the name of the United States, and under the seal of the said office; and be signed by the President of the United States, and countersigned by the Commissioner of the said office, and shall be recorded in the said office in books to be kept for the purpose."

"An Act to re-organize the General Land Office," passed July 4, 1836.

SEC. 1. Executive duties concerning public lands and private land claims, subject to supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.

SEC. 2. A principal clerk of public lands and [illegible] of private land claims.

SEC. [illegible] 3. Clerk of Surveys, his duties.

SEC. 4. "That there shall be appointed by the President, by and with consent of the Senate, a Recorder of the General Land Office, whose duty it shall be, in pursuance of instructions from the Commissioner, *to certify and affix the seal of the General Land Office* to all patents for public lands, and he shall attend to the correct *engrossing* and *recording*

and *transmission* of such patents." He shall prepare alphabetical indexes, etc.

[By Act of March 3, 1841 (5 Statutes at Large, p. 417), the further duty of countersigning patents was imposed upon the Recorder of the General Land Office.]

SEC. 5. Solicitor of—his duties. [This statute repealed by Act 12 July, 1844.]

SEC. 6. President to appoint a Secretary, "whose duty it shall be, under the direction of the President, to sign in his name all patents of land sold or granted under the authority of the United States.

SEC. 7. That it shall be the duty of the Commissioner to cause to be prepared and to certify, under the seal of the General Land Office, such copies of records, books, and papers on file in his office, *as may be applied for*, to be used in evidence in courts of justice.

SEC. 11. That such provisions of the Act [illegible] of the 25th April, 1812, entitled, etc., "and of all Acts amendatory thereof as are inconsistent with the provisions of this Act be and the same are hereby repealed."

"An Act to enable the pro[illegible]prietors of lands held by titles derived from the United States, to obtain copies of papers from the pro[illegible]per Deparment, and to declare the effect of such cop[illegible]ies," passed June 23d,

1823, (3 Stat. at Large, 721,) provides "That whenever any person claiming to be interested in or entitled to land under any grant or patent from the United States, shall apply to the Treasury Department for copies of papers filed and remaining therein, in anywise affecting the title to such land, it shall be the duty of the Secretary of the Treasury to cause such copies to be made out and authenticated under his hand and seal for the person so applying, and such copies so authenticated shall be *evidence equally as the original papers.*"

"An Act in relation to the exemplification of the records of land patents and other evidences of title and amendatory of the Act entitled An Act to Reorganize the General Land Office," passed March 3, 1843 (5 Statutes at Large, 627).

Be it enacted, etc., "That literal exemplifications of any such records which have been or may be granted in virtue of the provisions of the seventh section of the Act, approved on the fourth day of July, 1836, entitled 'An Act to re-organize the General Land office,' shall be deemed and held to be of the same validity in all proceedings whether at law or in equity, whenever such exemplifications are adduced in evidence, *as if the names of the officers signing and countersigning the same had been fully inserted in such record.*"

"SEC. 2. *And be it further enacted*, That exemplifications granted in pursuance of the aforesaid section of the act aforesaid of any warrant, survey, assignment, and other evidences, comprising the entire muniments of title whereon any patent has been based for lands granted by the United States, in the aforesaid Virginia Military Land District *or elsewhere*, shall be and are hereby declared and held as *of equal validity with the original patent*, warrant, survey, or other evidence of title on file in said office."

"An Act prescribing the terms on which exemplifications shall be furnished by the General Land Office," passed July 2, 1864 (13 Statutes at Large, 375), provides 'That from and after the first day of July next, *all exemplifications of patents* or papers on file, or of record, in the General Land Office, *which may be required by parties interested, shall be furnished* by the Commissioner of said office upon the payment, etc."

1 Brightleys Digest, 463-465; 2, Ib. 3[illegible]9.

[There are several other statutes which perhaps should be mentioned:

In the Act providing for the sale of the lands of the United States, in the territory north-west of the Ohio, approved May 18, 1796, it was provided that the *President* should grant patents; "and all patents shall be countersigned by the

Secretary of State, and recorded in his office." *Nothing is said about signing or sealing.* (1 Stat. at L. 468.)

The Act to amend the above, approved May 10, 1800, Sec. 7, uses the same language, (2 Stat. at L. 70.)

"An Act providing for the correction of errors in making *entries* of land at the Land Office," upon the application of the claimant, was approved March 3d, 1819. (3 Stat. at L. 526.)

An Act supplementary to this was approved May 24, 1824.

The correction is made upon petition filed—evidence taken by Register, transmitted by him with his opinion to the Commissioner of the General Land Office. (4 Stat. at L. 31.)

By another Supplementary Act, this Act was extended to cases where patents had issued on such erroneous entries, "upon condition that the party shall surrender his or her patent to the Commissioner of the General Land Office *with a relinquishment of title therein*, executed in a form to be prescribed by the Secretary of the Treasury." (4 Stat. at L. 201–2.)

"An Act to authorise the correction of erroneous selections of land granted to the State of Indiana, for the purpose of constructing the Michigan Road," approved June 28, 1834, declares void

and of no effect the selections therein named." (4 Stat. at L. 702.)

An Act, approved March 2d, 1833, authorized the appointment of a Secretary, "under the direction of the President, to sign, in his name and for him, all patents for lands," etc. The Act to continue in force till March 4, 1837. (4 Stat at L. 663).

Several Acts have been passed to confirm titles.

"An Act to confirm the sales of Public Lands in certain cases," approved July 2d, 1836 (5 Stat. at L. 73), confirmed sales made by officers of the old Land District before the opening of the office in the new, and entries made pursuant to instructions sent from the Treasury Department.

"An Act to confirm Land Patents," approved March 3, 1841, confirms patents: 1st. Not issued in the name of the United States; 2d. Not countersigned by the Commissioner; 3d. Where the President's name was printed or written by some person other than the President or Secretary. (5 Stat. at L. 416.)

"An Act to confirm certain entries of land in the State of Louisiana, and to authorize the issuing of patents for the same," passed April 14, 1842 (5 Stat. at Large, 472), and "An Act to confirm certain entries of land in the St. Augustine Land District, in the Territory of Florida, made under the pre-emption law of 22d June, 1838," approved

June 15, 1844 (5 Stat. at Large, 673), sufficiently disclose their purpose in their titles, and are referred to merely as showing the practice of the Department in respect to amendments.]

Code of Procedure, sec. 1864, sub. 3, makes the copy evidence "when the original is a record or other document in the custody of a public officer."

SEC. 1920. Entries in public or other official books or records, made in the performance of his duty, by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, *are primary evidence of the facts stated therein.*

SEC. 1937. In these cases the original need not be produced.

III.

The Record kept by the Government of its own Land Grant is the Original. The Patent is but the Evidence of what Exists in that Original.

"The set of documents which make up the original title papers of any tract of land from the original petition of the grantee to the final extension of title (usually called in Mexico the Espediente), do belong to the public archives. They either have to pass under the examination and approval of the different officials concerned in granting out

the public lands as the basis of their acts, or they are the very acts themselves of these officials constituting the preliminary and final acts of title, demonstrating for all future time the alienation of a specific portion of the public domain." Hanrick *vs.* Barton. (16 Wal. 172).

"The law provides that on certain acts being done, the citizen shall acquire title to a portion of the public land, and that a patent therefor shall issue, which shall be recorded. The *patent* is not the *title*, but merely *evidence* that according to law a portion of the public domain has been transferred to the citizen. Its efficacy proceeds from the law which authorizes and requires certain public officers to issue and record it. The record showing this to be done is a public act, and therefore a second patent which may issue is not a copy of the first, but is rather a republication of the original, and imports the same absolute verity. The difference between the record of patents and the registration of deeds is that the object of the latter is notice, and the registration is not of the essence or necessary to the validity of a deed, but patents are by law recorded when issued. The record is therefore a public document."

Hines *vs.* Greenleef, 3 Ala., 75.

"We cannot see why such papers should be called copies, or why, in the scale of proof, they should stand in any subordinate relation to the

paper handed to the grantee. If not counterparts or duplicates, it would seem that the *original paper is the record* retained by the Department as a part of its permanent records."

"The Government cannot be supposed to falsify its own records. It is interested in preserving them. The grant is strictly a public record, and the paper issued to the grantee is itself but a ministerial act of the same officer who make and preserve the record of it. If authority were needed to support these plain propositions, they are abundant. (Statute E, 166-174, Patterson *vs.* Winn, 5 Pet. 239, Jd, 241, U. S. *vs.* Arredondo, 6 Pet. 728.)

"An exemplification of a public grant under the great seal is admissible in evidence as being record proof of as high a nature as the original. It is a recognition, in the most solemn form, by the Government itself, of the validity of its own grant under its own seal, and imports absolute verity as matter of record." (Patterson *vs.* Winn *et al.*, 5 Peters, 241; 9 Pet., 672.) An exemplification of any record in the Land Office is of equal dignity with the original. (Lee *vs.* Getty, 26 Ill., 76.) "All public acts of officers in the Executive who are required to make and keep public records, may be competently shown by the public records thus kept, or by certified copies, etc. (Lane *vs.* Bommelmann, 17 Ill., 95.) "A copy given by a public officer whose duty it is to keep the original, ought

to be received in evidence." (U. S. *vs.* Percheman, 7 Pet., 83.) "In every well regulated government, the deeds of its officers conveying parts of the public domain are registered, or enrolled, to furnish permanent evidence to the grantees of the origin of their title. An exemplification of such record is of the same dignity as the grant itself," (U. S. *vs.* Sutter, 20 How, 175) "possessing equal claims to credit as the primordial or originals." (U. S. *vs.* Davenport's Heirs, 15 How., 7.) "It is important also that a record should be made of these grants, so that the Government may be advised in respect to the portions of our public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, are not deemed grants till the proper record is made." (U. S. *vs.* Vallejo, 1 Black, 555.) "It is always presumed to be done regularly till the contrary appears, or such reasons are offered for doubting its authenticity as are sufficient in law to rebut the presumption." (U. S. *vs.* Arredondo, 6 Pet. 724.) "The grant, legally and fully executed, was competent evidence of the matters set forth in it, and

as none other was necessary, it was, in effect, conclusive." (Ib). "The public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be an usurped, but a legitimate authority previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers claiming and exercising the right of disposing of the public domain did it by the order and consent of the Government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country, especially in the States where tenures to land depend on every description of inceptive, vague, and inchoate equities rising in the grade of evidence by various intermediate acts to a full and legal confirmation by patent under the great seal." (Ib. 724.) "The acts of public officers in disposing of public lands by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it and deny the power by which it is professed to be granted. Without the recognition of this principle there would be no safety in title papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments—9 Cr., 99; 5 Wh., 303—but in all the question is on whom the law

throws the burden of proof of its existence or non-existence, a grant is void unless the grantor has the power to make it; but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption arising from the full, legal, and complete execution of the official grant under all the solemnities known or proved to exist or to be required by the law of the country where it is made and the land is situated. *A patent under the seal of the United States* is *conclusive* proof of the act of granting by its authority; *its exemplification is a record of absolute verity.*" (Ib. 728.) "If admitted, the Court, jury, or Chancellor must receive it as evidence, both of the facts it recites and declares, leading to and the foundation of the grant, and all other facts legally inferable by either from what is so apparent on its face." (Ib. 729.)

"We have established that the copy of the petition and decree are made *prima facie* evidence by the certificate of the Secretary. What is *prima facie* evidence of a fact? It is such as in judgment of law is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose." (U. S. *vs.* Wiggins, 14 Peters, 347, citing Kelley *vs.* Jackson, 6 Peters 632.)

In the case of Banks *vs.* Woods (14 N. H. 100) it was held that certified "copies of records existing out of the State" are admissible in evidence

* * * "Copies of so much of the record as relates to the subject matter of the suit are allowed."

"We cannot presume that any Government system of granting land could be so loose as that no records were preserved by the granting power. And it follows, we apprehend as a universal rule, that wherever the acts of public officers are authenticated by their records, these records are evidence in all Courts of Justice of these acts. If by law, or usage having all this force of law, a California grant was a matter of record, then it would seem to follow that the record is proof of the grant." (Gregory *vs.* Pherson, 13 Cal. 572-3). "An Alcalde's book of records of grants made by him is admissible as a book of original entries." (Donner *vs.* Smith, 24 Cal., 122). "It is primary evidence simply because it is an official record." "The only thing to be delivered, was a copy or, if you please, an alias original, which was not given to the grantee in the sense in which we speak of the delivery of a private conveyance. It was not delivered to him because its delivery was necessary in order to give effect to the grant and vest in him the title to the lot. It was given to him in testimony of his right under the grant. We do not understand that the doctrine of delivery as applied by us to private conveyances has any application to grants made by Government either

under the Mexican system or our own. We so intimated in *Donner vs. Smith, supra.* We understand that the title under the grant vests the moment it has received the stamp of the last act required to completely authenticate the instrument, and that a delivery is not necessary." (Marburg *vs.* Madison, 1 Cranch, 137; Lott *vs.* Prondhomme, 173 Rob., La. R. 293. Lavergne's Heirs *vs.* Elkin's Heirs, 17 La. R., 226). (Donner *vs.* Palmer, 31 Cal., 513). "It is primary and not secondary evidence in the sense of the rule relating to the subject. It is not a copy and does not purport to be a copy of any act or instrument between private parties but is an official record of the acts of a public officer—of his own acts—made by him in the performance of his ordinary public duties. The fact that the Alcalde in making grants, also issued and delivered to the grantee a more formal instrument which was regarded as the grant, does not affect the character as original evidence of official entries like the one in question" (Ib. 519).

The book of accounts kept in the office of an Alcalde is admissible in evidence as the acts of that officer. (Kyburg *vs.* Perkins, 6 Cal., 674).

"The grant is of record in the public office. The letters patent are a transcript of the grant, authenticated by the great seal." (Bogardus *vs.* Trinity Church, 4 Sandf. Chy. 633.) A copy of a Spanish grant, certified by the Secretary, is com-

petent evidence of the grant. (U. S. *vs.* Bodman, 15 Peters, 130 U. S. *vs.* Delapine, 15 Peters, 326.)

When a record is required by law to be made and kept as an official act, the record is sufficient evidence without producing the original minutes from which it was made. (Thorn *vs.* Case, 8 Shep. 393.)

"If the instrument be duly recorded, this fact, of itself, furnishes sufficient *prima facie* evidence that it was duly executed." (Mayo *vs.* Mazeaux, 38 Cal. 442.)

Official registers, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, and under their personal observation, as well as all others of a public nature, are admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross examining the persons upon whose authority the truth of the documents depend—"because they are required by law to be kept; because the entries in them are of public interest and notoriety; and because they are made under the sanction of an oath of office, or at least under that of official duty."

Greenleaf, 483, 484, 485.

In the case of Clark *vs.* Hall (19 Mich. 356) the Court held that the exemplified copy of an assignment of a Land Office certificate for the purchase of lands, when filed in the Office of the Commissioner of the General Land office, in order to procure the issuing of a patent to the assignee, authenticated by the Commissioner, is admissible in evidence with the same effect as the original.

In the case of Seely *vs.* Wells (53 Ills. 120) the Court held that "the exemplification of the books and records of the General Land Office, certified under the seal of the office, is evidence in our Courts on the general principles of evidence."

In the case of Franklin *vs.* Woodland (14 La. An. 188) the Court say "duly authenticated copies of documents from the State Land Office are admissible as evidence."

Hines *vs.* Greenleaf, 3 Ala. (N. S.) p. 73, was an action of trespass to try title. The plaintiff offered in evidence two copies of patents which, taken together, covered the land in controversy, each bearing date September 1, 1824, and purporting to have been issued according to law, with a scrawl drawn around the letters L. S. thus (L. S.), where the seal of the General Land Office is always affixed in original patents of lands granted by the U. S. Government. On the copies was written the following certificate: "General Land Office, October 26, 1837. I hereby certify that the within is

a true copy of the patent on record in the office. In testimony whereof, I have hereunto subscribed my name, and caused the seal of the office to be affixed at the City of Washington, on the day and year above written. (Sg'd)James Whitcomb, Commissioner." To this certificate the seal of the General Land Office was duly affixed. No evidence was offered of dilligence used to procure and produce the original patents, or to account for their absence.

The Court admitted the copies in evidence against defendant's objection and exception. The Court say, "without entering on the inquiry whether the *constat* or *inspeximus* of the King's grant is as high evidence as the original at common law, or (as insisted by Judge Johnson) that such effect is given to it by the Statutes of 4th Edward or 13th and 17th Elizabeth, we think the question, at least in this country, may be placed on clear and indisputable grounds."

"The law provides that on certain acts being done, the citizen shall acquire title to a portion of the public lands, and that a *patent* therefore shall issue which shall be recorded. The patent is not the title, but merely evidence that according to law a portion of the public domain has been transferred to a citizen. Its efficacy proceeds from the law which authorizes and requires certain public officers to issue and record it."

"The record showing this to have been done is a public act; and therefore a second patent which may issue is not a copy of the first, but rather a republication of the original, and imports the same absolute verity.

The difference between the record of patents and the registration of deeds, is that the object of the latter is *notice*, and the registration is not of the essence or necessary to the validity of a deed—but patents are by law recorded when issued. The record is therefore a public document." * * *

"We are * * * of the opinion that the supposed copies offered in evidence were of as high dignity as the original."

In Den. on demise of Clarke *vs.* Diggs, 6 Ind. (N. C.) Law R. 159. "In order to make out her title the plaintiff offered in evidence a paper writing, certified by the Secretary of State, as being the copy of a grant, etc. * * * This evidence was rejected."

The Court say: "In rejecting the paper * * * his Honor erred. It escaped his observation that this very question was decided in the case of Candler *vs.* Lunsferd, 4 Dev. & Bat. 19. It is there ruled that grants or patents from the Soverign are enrolled in the office from which they emanate, and are then records. Like all other records copies of them by the common law may be used in evidence. * * * The Legislature

by an Act passed in 1748, recognizes this principle. * * * And though the Act of '48 is not brought forward in the Revised Statutes, we are of opinion that Act merely recognized the rule of the common law, and by the latter the copy was evidence * * *

In Archibald *vs.* Davis, 4 Jones (N.C.) Law R. 133: The plaintiff to show title offered in evidence a paper, certified by the Secretary of State, to be "a true copy of a record of a grant taken from a book in this office." The evidence was admitted against the objections and exceptions of defendant. The Court say the evidence was properly admitted.

The case of Farr *vs.* Swan, (2 Barr, 245), was an action of ejectment. The defendent introduced in evidence a plan of a square at Front and Vine streets, in the city of Philadelphia. This plan was certified to be "a true extract from the draft or plat of the city lots remaining on file" in the Land Office. The plaintiff objecting. The Supreme Court held that the evidence was properly admitted.

In the case of Morris and Wife *vs.* Gelston's Lessee 34 Md. 421), the Court say: "When the trial of a cause in the Supreme Court where the record is to be found, it has been the universal practice, which it would be unwise to disturb, to produce the record books as evidence."

The case of Floyd *vs.* Ricks (14 Ark. 288), was

an action of trespass, and one of the defendants introduced in evidence the certificate of the Register of the United States Land Office, to show that he had located the land for trespass upon which the suit was brought, with a "Choctaw certificate," and the Court held that it was competent evidence to show that the defendant had the right of possession, and that the plaintiff had no title to the close.

The case of The United States *vs.* Cutter *et al.* (2 Curtis' R. 617), was an action of debt on the official bond of Charles W. Cutter, as navy agent. The Court hold that the President speaks and acts through the heads of departments in reference to the business committed to them, and that the certified "copies of the correspondence" of Cutter with the department "were rightly admitted" in evidence.

"But the important fact to be noticed is that a *record* was required to be kept of whatever was done. The record was a guard against fraud and imposition, and enabled the Government to ascertain with accuracy what portions of the public land had been alienated. *The record was the grant*, and without it the title was not divested. The Governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession, but this 'titulo,' did

not divest the title unless record was made in conformity with law." (Peralta *vs.* U. S., 3 Wall. 440.)

Jackson ex dem McConnell *vs.* Wilcox is a well reasoned case and establishes that the patent is not the title, but the evidence thereof, and that the title under our government springs from the law. (15 Scam, 344.)

The case of Lane *vs.* Bommelman (17 Ill. 95,) was an action of ejectment, in which the plaintiff introduced in evidence a certified copy of a patent. The Court say: "A certified copy of the patent was admitted in evidence, *pro forma*, below, and is now objected to on the ground that such copies are not embraced within the statutes of the State, or the United States, relating to copies of records as evidence. *True, it is not, nor need there be any statute for that purpose, as it is admissible at common law.*"

In the case of Lee *vs.* Gentry (26 Ill. 76), the lower Court excluded the exemplification of the certificate of entry offered in evidence. The Supreme Court say: "An exemplification of any record or paper of record in the Land Office *is evidence of equal dignity with the original*, and may be read in evidence wherever the original would be admitted, without any preliminary proof whatever. The Court erred in excluding the exemplification of the certificate of entry."

"The King's grants are matters of public record, and no freehold can be granted by him but by matter of record; and they must pass through the prescribed offices, and be transcribed and enrolled (2 Bl. Com., 346; Com. Dig.; Patent A. E.; 2 Thomas' Coke, 489, N. A.)." * * * "A patent can always be proved by a *constat*, or an exemplification of the record, as well as by producing the patent itself (1 Phil. Ex. Corven & Hill's ed. 463, 3 Thomas' Coke, 297, Page's Case, 5 Rep., 105)." (McKennin *vs.* Bliss, 31 Barb., 182.)

IV.

The recording of a document which the law authorizes to be recorded, is evidence of the pre-existence of all that is necessary to autherize the recording.

In the case of Farrar *vs.* Fessenden (39 N. H. 278) it is decided "when it is made the duty of a public officer to record deeds and other instruments, and to furnish copies thereof, an examined copy of any instrument thus recorded may be received in evidence in any proper case without proof of the original."

In the case of McCauley *vs.* State (21 Md. 574), the Court, in discussing the "legal effect of an official copy of an instrument made evidence by

statute, such copies are *prima facie* evidence of all that is necessary to authorize their registration when it appears they have been duly recorded."

The case of Warner *vs.* Hardy (6 Md. 537), cited under Point I., in our former brief, is to the same effect.

Barton *vs.* Murrain (27 Mo. 235), was an action of ejectment. The plaintiff introduced in evidence an exemplification of a patent. The Court say: "The exemplification of the patent, certified by the Commissioner of the General Land Office, was properly received in evidence without proof of the loss of the original; and it is said to be evidence of as high a nature as the original as it is a recognition by the Government itself of the validity of its grant under its own seal. (Patterson *vs.* Winn, 5 Pet. 242)."

In the case of Warner *vs.* Hardy (6 Md. 537), it is decided that "a certified copy of an instrument required by law to be recorded, proves itself as *prima facie* evidence of all circumstances necessary to give it validity."

V.

Pencil marks or writing do not constitute any part of the record.

In the case of Meserve *vs.* Hicks (24 N.H. 295),

"the question submitted to the jury was, whether the summons at the time it was delivered to the defendant was indorsed in pencil or not, and the jury found that it was." The Court say: "In the case of Stone *vs.* A. V. Sprague, *ubi. seq* we have decided that however a signature in pencil may be held sufficient in private writings, writing in pencil is not sufficient in public records nor in papers drawn to be used in legal proceedings which must become public records." "Verdict set aside."

In Caldwell *vs.* Center (30 Cal. 542), the deed referred to a map duly recorded at the Recorder's Office. A book was produced from the Recorder's Office in which was pasted a map of the tract subdivided into lots, which map was made in pencil. The Court said:

"But his deed calls for a map duly recorded in the Recorder's Office, and by the utmost stretch of liberality the one produced cannot be regarded as recorded. The Act concerning County Recorders provides that the several instruments entitled to record shall be recorded in large and strong bound books, and in a fair, large, and legible hand." The necessary implication from this provision is that the instrument must be copied into the proper book of record, and in view of the purpose to be subserved by the recording of the several classes

of instruments mentioned in the act—the making and preservation of accurate and durable official copies of such instruments. A copy made in pencil or other materials that would not permanently remain would not be within the spirit of the Act. The map should for these reasons have been excluded."

VI.

The attempted mutilation of the record is unauthorized by law, and no effect.

In Bigelow *vs.* Stephens, 35 Vt., 521, the Court say: "We think the rule, as indicated by reason and authority is, that an alteration of a writen instrument by a stranger without authority does not render such instrument void."

In Fawcetts *vs.* Kimmy, 33 Ala. 261, the Court say: "The mere cancellation of the deed does not divest the title of the grantee."

In Jean *vs.* Lawlor, 33 Ala., 340, the Court say: "Two distinct offers of testimony, made by the appellant, were rejected by the Court below. A letter from the Commissioner of the General Land Office was embraced in each offer. This letter was but an assertion by the Commissioner * * * of his opinion of the legality of the two different

entries of the land in controversy, accompanied by information as to the manner in which the entry of the defendant might be perfected. This letter was inadmissible. The opinions which the Commissioner of the General Land Office may express as to the validity of the entries of land, can not, upon any principle known to us, be evidence to defeat a title already granted by the proper office.

* * * *

The case of Foster *vs.* Dugon (8 Ohio, 87), was an action of ejectment. The rights of the parties depended upon certain proceedings in partition through a sheriff's deed. "On the margin of the record of this deed the recorder entered the following memorandum:" "This deed was drawn by the recorder and executed in his presence by the sheriff. It was left in the office, subject to some arrangements with the grantee, but not delivered to him; afterwards, by an error, entered on record by the recorder, J. W. Brown."

In relation to the marginal note, the Court say: "The marginal note made by the recorder on the registry cannot be admitted as evidence to affect the validity of the deed. When it was made does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties he is

functus officio, and has lost his power over the subject."

The case of Merrick *vs.* Wallace (19 Ill., 486), was an action of ejectment. A deed was introduced in evidence, the record of which was proven to have been changed in the description. The Court held that "an alteration of a public record cannot deprive an innocent party of the benefit of it as originally made." After showing that the "deed was properly recorded," the Court say: "The question then arises, being properly recorded, can any subsequent alteration of the record deprive an innocent party of the benefit of the record? Shall not the record be read in evidence, according to the fact as certified by the recorder, and not as it now appears? Is the grantee in any manner responsible for the alteration, and must he account for it? Can any rule of law or principle of justice be successfully invoked to make him responsible? We know of none." * * "His whole duty being discharged by actually having his deed properly recorded, no subsequent act committed on that record can affect him under such circumstances as are developed here."

In Holmes *vs.* Budd (11 Iowa, 186), it was assigned that the Court erred in rendering a judgment in this cause in vacation. The verdict was found,

filed, and entered December 11th, 1859; and a motion for a new trial was made and overruled the same date. The judgment appears by the record to have been entered 13th December, 1859. There was a record entry of the clerk upon the 11th January, 1860, stating there was filed in his office of that date, an order of the Judge, directing a judgment to be entered in the verdict. The Court say: "We can not regard this as sufficient to show that the record of the judgment was not made at the time it purports to have been made. Nor do we regard the certificate of the clerk made in this cause, after this transcript was sent to this court, as sufficient to impeach his record entry. In this transcript he certifies that this judgment appears of record as made of the 13th day of December, 1859; and this is certified to as being a full and complete copy of records of said cause. The record is better evidence than the subsequent certificate, and must prevail."

VII.

No officer can impeach his own record.

In Holmes *vs.* Budd, 11 Iowa, 186-190, it was held, that the certificate of the Clerk of the District Court will not be received to impeach a record entry. The Court say: "The record is better evidence than the subsequent certificate, and must prevail."

The judgment, as appears from the record, was entered upon the 13th day of December, 1859. There is a record entry made by the Clerk of said Court upon the 11th day of January, 1860, in which is stated that there was filed in his office of that date, an order of the Judge of said Court directing him to enter up a judgment in this cause upon the verdict of the jury. We cannot regard this as sufficient to show that the record of the judgment was not made at the time that it purports to have been made. Nor do we regard the certificate of the Clerk made in this cause after this transcript was sent to this Court as sufficient to impeach his record entry. In this transcript he certifies that this judgment appears of record as made upon the 15th day of December, 1859, and this is certified to as being a full and complete copy of the records of said cause. The record is better evidence than the subsequent certificate and must prevail.

Holmes *vs.* Budd, 11 Iowa, 190.

In Attorney General Cushing (in 6 Opin. Attorney General, 226), says: "The Secretary of the Interior, acting conscientiously, as the complainant concedes, has decided a question of fact, which he alone had the power to decide, according to his judgment of the truth, and has in conformity with such judgment, awarded the contract to one of the

bidders, who now has a vested right therein. The Act of Congress provides no method by which that decision may be revised. It is final so far as regards the subject matter, that is, the particular contract, as in the case of any other matter decided in good faith, whether erroneously or otherwise, by the official authority to whom the decision belongs."

In the case of Babb *vs.* Carroll (21 Ten. 765), it is decided that in granting the certificate of a headright, it was the duty of the Commissioner to niquire if the party applying had a family in Texas, and having determined the fact it is not open to subsequent investigation after the issue of patent *or even before.*

VIII.

He cannot correct, or amend, or reverse the acts of his predecessor.

In Lick *vs.* Diaz (30 Cal. 15, it was decided that "when an Alcalde made a grant of a lot to two persons jointly, and afterwards certified on the same piece of paper that one of them had renounced his right and the lot had become the property of the other, such certificate is insufficient to establish the fact of renunciation, but the presumption is that the title remained in the person

alleged to have renounced." "The title having vested in Diaz and Mesa *en comunia*, the latter could not be divested of his interest in the property at the mere will of the Alcalde, even if it were conceded that he attempted, in his official capacity, to do this."

"In the same case, on a second appeal, 37 Cal., 437, the Commissioner said: "If the grant was made *se quid*, and recorded in due form by the Alcalde, and nothing farther appeared, it may be conceded, for the purposes of the case, that the title vested in the grantee, though it should affirmatively appear that the paper was not actually delivered to them, and that the fees were not paid." Justice Crockett holds that if the grantee immediately afterwards appeared in person before the Alcalde and declined to accept it as made, and desired a modification of the grant, it might be done, though he considers that this could not be done under "our system of granting the public domain, where the grant consists of a number of acts to be performed by several agents or officers, and all culminating in a patent to be issued by the President."

In 2 Opin. Att'y Gen'l, p. 9, Mr. Wirt says it is a rule which each administration has prescribed for itself to consider the acts of its predecessors conclusive; if open for review or reversal, the same principle will open decisions made during the

presidency of Washington, and keep the acts of the Executive perpetually unsettled and afloat. Mr. Tousey, in 5 Opin. Att'y Gen'l, p. 29, holds that there is no law that authorizes the head of any Department to supervise the acts of his predecessors. And in the same volume, page 123, Mr. Reverdy Johnson announces the same principle; and on page 285, Mr. J. J. Crittenden follows the same rule of decisions. In Vol. 9, Opin. Att'y Gen'l, Mr. J. S. Black reiterates the principle that a matter cannot be opened by a succeeding head of a Department after it has been adjudicated by his predecessor. The same rule was followed by Mr. Henry Stanbury in 12 Opin. Att'y Gen'l, 355. Mr. Hoar, in his opinion, April 12, 1869. Mr. Ackerman, March 7, 1871. Mr. Secretary Cox in and the present Secretary Drummond in

Also, in Chorpening *vs.* U. S., 3 Ct. Claims Rep., 147; Riley *vs.* U. S., 1 Ct. Claims Rep., 299; Mitchell *vs.* Cobb, 13 Ala., 137; Franklin *vs.* Woodland, 14 La., An., 188; Wilcox *vs.* Jackson, 13 Pet., 514, and Kendall *vs.* Stokes, 3 How., U. S., 98–9.

IX.

The certificate in red ink across the face of the record is no proof of the matters therein stated.

In the case of Childress *et al. vs.* Cutter (16 Mo. 44), upon the question of certified copies of records, the Court say: "It may be taken as an established principle of law that a certified copy of any record or public paper by the officer intrusted with its custody is evidence, if the original would be. Copies of the registries of marriages, births, and burials are evidence of what they purport to record, namely: that certain persons were married, born, or buried at a particular time or place; but they are not evidence of any other facts inserted in them as of the time and place of the the birth of an infant. 2 Phil. 284. An entry in a Register of Christenings, stating the year of the birth, is not evidence in support of a plea of infancy; and the mere entry of christening, unaccompanied by any evidence showing that the person was young at the time of christening, does not prove the fact of birth in the parish. 1 Phil. 410. So Greenleaf, speaking of entries made in discharge of official duty, says, that to be admissible they must be such as it was the person's

duty to make, or which belonged to the transaction as part thereof, or which was its usual and proper concomitant. * * * Sec. 113."

In the case of Obermier *et al. vs.* Core *et al.* (25 Ark. 562), it is decided that the certificate of a sheriff setting forth the performance of acts not in the *line of his official duty*, is not admissible evidence; that the evidence "was nothing but hearsay, and should have been excluded."

In the case of Cornelison *vs.* Browning (J. B. Monroe, 50) the Court held that the certificate of the clerk of a sister State that a will was duly proved and admitted to record, is insufficient evidence of the proof of the will. The order of the Court made upon the proof should be copied and duly certified. "A clerk has no authority to certify what a record contains, or what judicial proceedings occurred in the Court of which he is clerk. His certificate of those matters is insufficient, and not admissible as evidence."

In the case of Southwick *vs.* Andrews (24 Texas, 488), it is decided that the certificate of the Commissioner of the General Land Office is not admissible to prove that a deed from one person to another is in his office; nor can the fact that a land certificate has been transferred by one person to another, or that land has been conveyed from one person to another be proved by the mere certificate of any person or officer.

In the case of Perry *vs.* Block (1 Mo. 344), it is held that "the transcript of the docket of the Justice of the Peace is admitted to prove nothing but what the law requires to be written on the docket, and a transcript being filed when the case was brought into the Circuit Court, is evidence that there was a trial and of the proceedings had in the trial. The law nowhere requires a Justice of the Peace to write down the testimony of witnesses on the trial of an action, and it is therefore not admissible evidence of the truth of the facts sworn to on the trial."

The case of Owens *vs.* Norwood (2 H, & J. 96), was an action of ejectment. The plaintiff read in evidence an office copy of a deed from Thomas Brown, the patentee to John Gadsby, bearing date the 2d day of May, 1700, for the land called Brown's Adventure, purporting to be sealed and delivered by Brown, in the presence of Cha. Carroll and Thomas Bland, and having the following indorsements: "May 4th, 1869. Then received of the within named John Gadsby, the sum of two pounds sterling, being for the fine due the right honorable, the Lord Proprietory, upon the alienation of the land within mentioned. As witness my hand, CHA CARROLL."

The Clerk indorsed on the record of this deed the following:

"Memorandum—That the date of this was originally according to the date of the above receipt, but aliened by consent of the Provincial Court, and parties to bring it within the Act of Assembly." "W. TAYLAND." The Court held "the endorsement not evidence, being an act done by Tayland without authority, and that the deed is operative and valid to transfer the land to Gadsby."

The case of The State *vs.* The Governor (1 Dutcher's R., 331), is an application to the Court for a *mandamus* commanding the Governor to sign and issue a commission to William Gledhill, who claimed to have been elected Surrogate of the County of Passaic. The law required that "The result of the election of all county officers is submitted to the determination of the board of county canvassers." Their "official certificate" showed that a person other than Gledhill had the highest number of votes for Surrogate. But their certificate, with outside "statements," upon which the application was based. * * *

The Court say: "The statements accompanying the official certificate of the Board of County Canvassers are not authorized by law, and constitute no part of the return. They must be re-

jected as mere surplusage. They form no ground upon which the Governor could act in issuing the commission."

In Arnold *vs.* Grimes (2 Iowa, page 85), the Court say: "After a careful examination of all the authorities upon the question, called upon for the first time to declare the law upon this subject, we unhesitatingly adopt the language of the Supreme Court in the case of Patterson *vs.* Winn 'that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had not title, it may be impeached collaterally in a court of law in an action of ejectment. But that for the investigation of all other questions a court of equity is the most eligible tribunal, and they ought to be excluded from a court of law.'"

X.

A patent can only be amended or cancelled by scire facias, or bill in equity.

Bates *vs.* Herron, 35 Ala., lays down the rule as gathered from all the authorities, that a patent of the United States imports a complete appropriation and disposition of the lands it assumes to convey, and no defect in the preliminary steps

can be raised against it in an action at law to recover the possession of the land, except when the Government had no title to the land or the the same were not subject to sale, in which case the patent would be void at law.

Hartley *vs.* Hartley, 3 Met. Ky., 56, declares the rule to be well settled that a patent cannot be avoided at law in a collateral proceeding by matters *de hors* the patent, unless it is declared void by statute or its nullity indicated by some equally explicit statutory denunciation.

1. The case of Williams *vs.* Carpenter (35 Mo. 52), was an action of ejectment to recover a certain piece of land, alleging that it was the same tract which was proved before Recorder Hunt, in the name *Louis* Lacroise, meaning *Joseph* Lacroise. The plaintiff claimed title under Joseph Lacroise, and the defendant under a Louis Lacroise.

At the trial, the plaintiff gave in evidence the confirmation to Louis Lacroise, in the usual tabular form, and evidence tending to show that the transformation of the land in controversy was to Joseph Lacroise instead of Louis Lacroise.

Among other charges asked by the plaintiff, the Court charged: "If the jury find from the evidence that Joseph Lacroise was the person who appeared before the Recorder in 1825, as stated in instruction No 1, for plaintiff, and that he was the person to whom such certificate of confirmation was

actually issued, then the plaintiff is entitled to recover if he has shown a derivative title to the premises in question under Joseph Lacroise's legal representatives."

2. The verdict was for the plaintiff.

The Supreme Court say, * * * "That when a grant, though by mistake is made to another, cannot divest him of his title by showing that he was the person for whom the bounty was intended. If the Government on a false suggestion or by mistake has granted a patent, it can only be avoided by *scire facias* or other suitable proceeding instituted for that purpose. *It cannot be done in a collateral action.* * * * The plaintiff's theory is, that Joseph Lacroise, under whom he claims title, was the person who made proof before the Recorder, and was the person who was intended to be confirmed." * * * "The utmost that can be said for the plaintiff's title, upon his own theory is, that it is an equitable title." * * * "Let the judgment be reversed."

Morton *vs.* Blunkenship, 5 Mo. 346, was ejectment by the holder of a land certificate against one who had a patent for the same land, issued on a junior certificate. The Commissioner of the Land Office undertook to cancel the entry of Haydon upon which the senior certificate issued, and issued a patent upon the junior entry and certificate of Lowis. The Court say: "But had the Commis-

sioner power to vacate Haydon's entry to make room for Lowis'? This is a power not given the Commissioner by the Act of Congress. Haydon had purchased the land, and paid for it, and the executive officers of the United States had no further control over it, unless Haydon himself had applied to have his entry changed. No person can be deprived of life, liberty, or property without due process of law. The proceedings by which Haydon's entry was attempted to be vacated, was clearly not a proceeding authorized by any law of the land, and was, therefore, an attempt to deprive him of his property, 'without due process of law.' If his title was defective this defect under the existing laws could be determined only in the Courts of Justice of the country. * * * * The attempt to vacate Hayden's entry was an attempt to deprive him of his property, without the intervention of 'the judgment of his peers' against the law of the land, without 'any due process of law,' and in a mode unknown to the law. In attempting to vacate Haydon's entry, then, the Commissioner attempted to do that which he had no power to do; and as he had no power to vacate it, Haydon's entry was not vacated." The Court then held that Haydon's entry and the senior certificate thereon should prevail over Lowis' entry and the junior certificate and patent thereon.

The cases of Leach *vs.* Ranch (3 Minn., 448),

and Camp *vs.* Smith (2 Minn., 155), recognise the doctrine that a patent cannot be impeached *even by a subsequent grantee* for irregularities in the preliminary steps upon which it is based, and that the Register and Receiver, acting within the limits of their jurisdiction, is final and conclusive.

Stephens *vs.* Westwood, 25 Ala. 716, was trespass to try titles. The plaintiff offered a certified transcript from the Department of the Interior, purporting to be an extract from a book of locations on file in that office, made by one of the United States locating agents, showing that Scohecharche (a Creek Indian) was located on this land in 1834, as her reservation under the treaty of March 24th, 1832, and a certified copy from the General Land Office of an approved contract between the reservee Scehecharche and Nat Macon, Thornton & Co., and assignments thereof to plaintiff; and the patent of the United States to plaintiff, dated December 10th, 1845, which patent recited the reservation, the contract, and assignments thereof—all which were admitted contrary to the objections and exceptions of defendant.

Defendant offered his senior patents, dated May 1st, 1839, and April 5th, 1837, which recited that the land was sold under the Act of Congress of April 24th, 1820. Defendant offered to show by witnesses, and also by the record of the State Land Office, that no Indian had ever been located

on the premises in controversy, which, upon plaintiff's objections, was excluded, and defendant excepted.

The Court say, "It is manifest from what we have said, that, in a controversy between those claiming under these conflicting patents, the question of right must depend upon whether the Indian, under whom Westwood asserts a prior claim, was located upon the land or entitled under the treaty. He has shown that she was located and entitled, by the transcript from the locating agent's record of locations, properly certified, and which appears in evidence; and upon this evidence, unimpeached, coupled with the patent, and transfers, and improved Indian's deed, the Court would have been entirely justified in charging the jury that the title was with the plaintiff. * * * This designation of the land opposite the name of the Indian upon the rolls of the locating agent, which were forwarded to Washington and filed in the public archives, constituted 'the location.' The questions whether the Indian was the head of a family, and entitled under the treaty to the particular tract set apart for her, have been decided by the officers of the Government, and are not subject to be revised in this collateral way. * * * * In our opinion, the action of the Government, in ascertaining the heads of families, and setting apart their lands, or locating them, as we

have above shown locations were made, when returned by the respective government officers, and confirmed by the Department entrusted with the matter by law, becomes final, and no one has a right to put the reservee upon proof, other than that furnished by the government *records*, of her right to the land set apart opposite her name as her reservation. It follows, therefore, that the offer in the Court below to show that this reservee was not located, when the Government record shows that she was, is an attempt to impeach collaterally the Government record, and was properly disallowed."

In the case of Woods *vs.* Nabors (1 Stewart, 172), it is decided that "A certificate of the Register of the Land Office of the United States, not issued in the discharge of his official duties, is not evidence."

In Smithwick *vs.* Andrews (24 Texas, 494), the court say: "The Court below did not err in sustaining the objection to the admissibility in evidence, of the certificate of the Commissioner of the General Land Office; that there was on file in that office a transfer of the county warrant No. 1070 concerning which this suit is originated. That was not a fact which the Commissioner of the Land Office could certify, in the manner exhibited by the certificate offered in evidence in this cause. Whenever the Commissioner of the Land Office certifies that a writing is a true copy of an original

in his office, then such writing is admissible in evidence in the Courts of the State, because of the Commissioner's certificate, and because it is a part of his official duties to give such copies of instruments. But it is no part of the official duties of the Commissioner of the Land Office to certify that there is in his office a deed from one person to another. Nor can the fact that a land certificate has been transferred by one person to answer, or that land has been conveyed by one person to another, be proved by the mere certificate of any person or officer.

XI.

His certificate to the copy of the record is evidence only so far as it certifies the record.

Medlin *vs.* Platt County, 8 Mo. 235, was an action on an instrument in writing, in which Allen was principal and Johnson & Medlin were sureties. Johnson's name was erased. It was claimed by the Clerk under the direction of the County Court. It was contended that the erasure operated to discharge Medlin. The Court say: But the act of a stranger, without the participation of the party interested, is a mere spoliation or mutilation of the instrument not changing its legal operation, so long as the original writing remains legible, and

if it be a deed, any trace of the seal remains. But if the county officers had defaced this instrument, "their act could have been no other than the act of a stranger, they having no authority to do the act."

In Young *vs.* Thompson, 14 Ill. 380, the Court held: "It is not competent to sustain the judgment by recitals in the Sheriff's deeds, or by certificates or statements of the clerk."

In Cross *vs.* Pinckneyville Mill Co., 17 Ills., 54, a certificate of the Secretary of State was offered in evidence to the effect that a certificate of the organization of the company had not been filed, etc., on or before a certain date. Scates, C. J., says: "I am not aware of any statute or rule of law that makes such a certificate evidence of anything. The certificate of the Secretary will be sufficient to authenticate the laws of the United States, and all laws, acts, resolutions (of our own State), or other records pertaining to his said office. But I deem it a misapprehension of the true object of such a certificate, when offered to prove what is not of record, or that this certificate is not of record. Any person who has examined offices or records who can, may swear and so prove that the matter is not there of record."

In Den. Ex Dem. Harker *vs.* John Gustin, 7 Halstead, 42, it is held that the statement of the officer before whom a deed was proved that the

person proving the same was a subscribing witness when the fact does not appear in the oath or on the deed, is ineffectual.

The case of Farmers' & Mechanics' Bank *vs.* Bronson (14 Mich. 361), was an equitable action to redeem certain premises from the effect of a mortgage, and charge defendants with certain rents and profits. The defendants relied on a paramount title, and among other defenses to sustain this title, was a claim of an equitable mortgage that took precedence on the record, for the reason that the mortgage under which the redemption was sought was only an equitable mortgage, the mortgagors having failed to attach seals to their signatures. The original of the last mortgage named was not put in the case, and the evidence that the seals are wanting, consists in the facts that no seals appear apposite the names in the copy given from the record, and that the Register of Deeds certifies that the words "not sealed" are entered in the record opposite the names in the hand-writing of his predecessor. "This certificate is not legal evidence. The Register was bound to record all instruments properly executed by spreading a true copy on the record but he had no authority of law for certifying statements of fact to make them evidence against other parties. The original entry being unauthorized would not be evidence, and the copy would be equally incompetent."

In Stiner *vs.* Ellis, 6 Ind. 161, the Court says: "For the purpose of showing that Huff & Myers had not obtained a patent for the alleged improvement, the Circuit Court admitted in evidence, against the plaintiff's objection, a certificate of the Commissioner of Patents, under his seal of office, stating that no patent for an improvement in churns had been issued to Messrs. Huff & Myers.

This we think was erroneous. If there is any statute authorizing that mode of proof we have not been able to find it, nor is any referred to by counsel. We are aware of no rule of law which authorizes a public officer to certify what does not appear in his office for the purpose of evidence.

In Henfru *vs.* Bromley, 6 East, 310, it was held "that if an umpire alter an award in a material part, after the expiration of his power, the award is not thereby rendered void, but is good as originally made."

In Jackson *vs.* Malin, 15 Johns' 293, Platt J. says, that a material alteration * * by a stranger without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent.

In Rees *vs.* Overbaugh, 6 Cowen, 746, it was decided if a stranger tear a seal from a deed, it shall not destroy it.

In Nichols *vs.* Johnson, 5 Comst. 192, the Court say: "It can hardly be conceived, if a deed or

other instrument of writing is not rendered inoperative, either by a mistaken alteration or its loss, or even entire destruction, how it can be by an unauthorized intermeddling of a stranger."

In Doe Ex Dem. Tillman *vs.* Long, 29 Ala. 378, the Court say: "The certificate of J. R. Poinsett, Secretary of War, indorsed on a deed, and not under the seal of his Department, that the deed had been approved by the President, is not evidence of the fact of the President's approval. The deed offered in evidence in this case was one made in 1834 by a Creek Indian, conveying his reservation, under the treaty of 24th March, 1832, and does not convey the title without the President's approval. Therefore, the Court did not err in excluding the deed from the jury. The clear and indisputable principle that "the President speaks and acts through th heads of the Departments, in relation to subjects which appertain to their respective duties, laid down in Wilcox *vs.* Jackson, 13 Pet., has no application here. It is not a duty of the Secretary of War to prove by his certificate the fact of the President's approval. If it be true that the President's approval is shown by the records in the War Department, it may be that the record might be certified by the certificate of the head of that Department; but it would be at war with principle and authority to permit him to prove by his certificate the facts evidenced by the

record. It would contravene the principle that the record is the best evidence, and would substitute the judgment of that officer for that of the Court as to the effect of the record. The authorities cited below fully sustain our several positions.

3 Phil. on Ev., C. & H. Notes, note 702.

Greenl'f Ev. 637, § 498.

Brown *vs.* Chambers, 12 Ala. 713."

Martin *vs.* Anderson, 21 Geo. 301–308, was an action of ejectment. The defendant sought to show by the certificate of certain public officers, that the grant under which plaintiff claimed, issued by mistake to the wrong person. The Court say: "The certificates of the several officers of the State tendered in evidence were offered to establish the fact, that the grant for the tract of land sued for was issued by some means to the wrong person. They prove that the tract of land was drawn in the land lottery, and that it was not drawn to a fictitious name; and that the drawing was legal. The difficulty arose afterwards. The grant offered in evidence was to William Anderson, and the proof of the facts proposed to be made by the *certificates* cannot divest him of his title, and could not affect *bona fide* purchasers claiming through him."

"But the certificates themselves are inadmissible on another ground. They certify to facts or to

the non-existence of a name in a particular relation in the offices which they hold. They certify to no copy or transcript of any record, document, or paper on file in the offices under their control. The laws on this subject have reference to certificates of officers, authenticating files or records, etc., attached or belonging to public officers, and not to facts, for both statutes on this subject contain provisos that the Court may require the production of the originals certified to. To mere facts, an *ex parte* deposition is not admissible, and the statute does not make an *ex parte* certificate of a fact admissible.

The case of Doe ex dem. Foute *vs.* McDonald (27 Miss. 610), was an action of ejectment. The plaintiff offered in evidence a certificate in the following words:

"I, Austin Morgan, Register of the Land Office at Jackson, Mississippi, formerly Mount Salus, hereby certify that Jacob Collins entered the west half of north-east quarter of section five, township seven, range three west, containing seventy-seven and forty-four one hundredths acres, on the seventh day of September, 1835, as appears of the records of this office. Given under my hand and private seal, having no official seal, * * *

AUSTIN MORGAN, [SEAL.]
Register.

Jackson, December 1, 1849."

The Court ruled out this evidence, the defendant objecting, on the ground that it was a certificate of facts, and not of the record, as required by law. The Supreme Court sustained the ruling of the Court below.

"Certified copies of papers in the Patent Office must be received as *prima facie* evidence of the genuineness of the originals, and absolute evidence of the correctness of the copies from the record." (Parker *vs.* Hawoth, 4, McLean, 370.)

"We know of no statute of California or of the United States authorizing the performance of the acts set forth as the certificate of Gift, Register of the Land Office at Benicia of December 24, 1863, or any statute or principle of law making the certificate evidence of the facts stated. Its admission in evidence was error. The same may be said in respect to the admissibility of the certificate of S. T. Nye, Register of the Stockton Land Office, of December 26th, 1864. This certificate is not a certified copy of any record in his office. It is simply a statement of facts within his knowledge relating to past transactions. We have not been referred to any statute or authority showing such statements to be competent evidence for the purpose for which it is now sought to be used. It is offered in evidence in a court of justice upon a litigated point respecting title to lands, not presented as the certificate of an officer of one Department of the Govern-

ment for the information of another, upon a matter relating to the duties of his office in pursuance of the provisions of some statute of regulation of the respective Departments, describing the course of their proceedings. Nor is it offered to show the fact that such a certificate was presented to and acted upon by an officer of the government, or was a link in the chain of an official proceeding resulting in a patent. It was offered as competent evidence to establish the facts therein recited. We know of no statute or principle of law taking this certificate out of the ordinary rules of evidence applicable to proceedings in courts of justice. We think it was improperly admitted." (Hastings *vs.* Devlin, 40 Cal. 364—371.)

In Herdon *vs.* Carian (77 Texas, 322), it has held that a testimonial of public acts done under the former government are receivable in all respects as originals; that the Commissioner of the General Land Office is authorized to file certified copies to be read as evidence of all records, books, and papers, the legal custody of which belongs to his office; but his certificate will not give legal authenticity to papers which are mere private property, and which do not belong to nor constitute archives in his office.

"It is also necessary, in all these cases, that the register be one which the law requires should be kept, and that it be kept in the manner required

by law." 2 Greenleaf, Sec. 493, citing Neubair *vs.* Raithtry, 1 Phillips, 315, Reed *vs.* Powell, 1 Esp., 213, Whittuck *vs.* Waters, 4 C. and P., 375. The facts stated must be within the personal knowledge of the officer, for this reason: "A ship's register is not evidence of the entry, not being any transaction of which the public officer who makes the entry is cognizant." (Ib. 494.) So a ship's log-book, where it is required by law to be kept, is an official register, so far as regards the transactions required by law to be entered in it, but no farther. (Ib. 495.) To make a register official, it must be directed by the proper authority to be kept, and kept according to such directions. (Ib. 496.)

"In regard to *certificates* given *by persons in official stations*, the general rule is that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated; but as to matters which he was not bound to record, his certificate, being extra official, is merely the statement of a private person, and will therefore be rejected. So, where an officer's certificate is made evidence of certain facts, he cannot extend its effect to other facts by stating those also in the certificate; but such parts

of the certificate will be suppressed." (1 Greenleaf, Sec. 498.)

"The objection that the signature of the Secretary of the Treasury was signed by his chief clerk, seems not to be important. It is *the seal* which authenticates the transcript, and not the signature of the Secretary. He is not required to sign the paper. If the seal be affixed by the Auditor, it would be deemed sufficient under the statute." (Smith *vs.* U. S., 5 Pet. 302.)

XII.

If the officer, certifying a copy of a public record, inserts something more which he is not authorized to certify, this is surplusage, forms no part of the document, and is not in evidence.

The case of Dikes *vs.* Miller (11 Tex., 98), "was an action of trespass to try title." "The plaintiff read in evidence a translated copy from the General Land Office of the original grant to Wickson." "To this there was attached what purported to be a conveyance, or release, by the grantee to the Government of the title to the land granted.' This instrument bore date on the 2d day of June 1843, and recited as the consideration on which it

was made that the grantee "has subsequently received from the Government of Mexico a title to one league of land as his final right." The plaintiff objected to the reading of this instrument in evidence on the ground that it was not an archive of the Land Office, and not admissible in evidence by virtue of the Commissioner's certificate, and that it was not a part of the plaintiff's title, but was attached to it by the officer without his consent. The Court (below) overruled the objection, and required the plaintiff to read the paper in evidence." * * * "The Court instructed the jury" that the release of Wickson, introduced as a part of plaintiff's title, divested the said Wickson of all title to the land in question; and his, Wickson's, subsequent transfer of the land conveyed no title to the plaintiff."

The Supreme Court say: "The ground on which the Court required the plaintiff to read in evidence the conveyance or release from Wickson to the Government, evidently was that it was brought into Court by him as a part of his title. But in this we think the Court erred. There was no evidence of the genuineness of the instrument, nor does it appear how or when it came into the possession of the Commissioner of the General Land Office. It was not an instrument which belonged to his official custody, and consequently was not one of which he was authorized to give certified

copies to be used in evidence. It manifestly was not a part of the plaintiff's title; and the fact that it was attached to it by the Commissioner did not, in our opinion, impose on the plaintiff the necessity of introducing it in evidence.' * * * "Whether the charge of the Court was correct or not in the abstract, in its application to the evidence, it was, we think, erroneous."

In Leblanc *vs.* Ludrique, 14 La. An. 772, a ground of error was the refusal of the Court to admit in evidence an indorsement of the Register of the Land Office, on an application made by Daniel Zeringue, October 9th, 1830, in these words: "On this day, the 8th of September, 1855, Baptiste Calais, duly authorized, tendered payment for the land claimed in the within proof, and was refused in consequence of the said land having been erroneously sold to Charles Leblanc fils." The Court say: "The Receiver had no authority to certify as to the agency of Baptiste Calais; nor could he make a binding entry as to the invalidity of the plaintiff's purchase."

Brown *vs.* The Independence, Crabbe R. 54, holds that a Consul's certificate is not evidence of acts not official or within his personal knowledge.

McGowan *vs.* Crooks, 5 Dana, 65, holds that a Register's attestation to a copy of a survey does not apply to or authenticate an indorsement upon the back of it; and in the absence of other evidence

an indorsement upon the copy, offered as evidence of a like indorsement on the original, was properly rejected.

XIII.

It is the affixing of the seal which passes the title.

In the case of Donner *vs.* Palmer, 31 Cal., 514, the Court cite, with approval, the cases of "Lott *vs.* Proudhomme, 3 Rob. La. R., 293, and Lavergne's Heirs *vs.* Elkins' Heirs, 17 La. R., 226, saying:

"In Lott *vs.* Proudhomme, *supra*, a patent was issued by the General Land Office and sent to the Register of the Land Office in Louisiana. Subsequently, the Commissioner of the General Land Office directed the Register not to deliver the patent, and it was accordingly withheld. Nevertheless, the patentee brought ejectment upon it, and on the foregoing state of facts the Supreme Court of Louisiana (Mr. Justice Bullar) said: 'Even admitting the right of the Commissioner of the General Land Office to cancel an entry and sale of public lands before the issuing of the patent, yet the moment the patent has passed the great seal, it is beyond the power of the officers of Govern-

ment. It is true the instrument in this case has been withheld, but we conceive that mere possession of the parchment does not affect the right of the patentee.' So it was held that a delivery of the patent was not necessary in order to vest the title in the patentee."

"To the like effect is the case of Lavergne's Heirs *vs.* Elkin's Heirs, *supra*. In proof of title the plaintiffs produced the books of Spanish grants from the Land Office in New Orleans, in which was recorded a grant to their ancestors by the Governor of Louisiana. The grant was *unsigned*, yet the Court held it to be sufficient evidence of title in the plaintiffs. The cases of Enfield *vs.* Perrine, 8 N. H., 512, and the Proprietors of Enfield *vs.* Day, 1 N. H., 590, are also to like effect."

"The seal is in itself the highest test of authenticity, and leaving the evidence upon that alone precludes all controversy as to the officer entitled to affix the seal, which is a regulation very different in the different States." (U. S. *vs.* Johns, 4 Dall 416; U. S. *vs.* Amondy, 11 Wheat. 392.)

"It certainly would have been more regular for the Secretary himself to have countersigned the grant, but on that account it cannot be unsealed. The true question here is did the State of North Carolina execute the grant. It is obvious it did, for the Court can, judicially, know the seal of that State." (Ayres *vs.* Steuart, 1 Overt. 251.)

XIV.

The patent takes effect from its date, and needs no delivery.

"It is unnecessary, in order to give effect to a patent, to show an acceptance of it by the patentee. The general rule is that a patent takes effect upon its being issued, and it is unnecessary to show a delivery to or acceptance by the patentee. * * * The patentee is as powerless to prevent the patent from issuing and taking effect, if the proceedings have not been dismissed, as he is to prevent the rendition of a decree determining the question of the validity of the claim." (Chipley *vs.* Farris, May 9, 1873.)

XV.

The fact that the record of the patent does not contain "the name of the person countersigning the same," does not effect its validity.

In the case of De France *vs.* Stricker (4 Watts, 327) in affirming the decision of the lower Court in relation to the admission of a copy of "a certified

extract from the general draft of donation land, showing a particular draft for which a patent had issued," under the Act of 24th March, 1785, the Court say that the draft "is a public record to serve, to all intents and purposes, in lieu of recording the patents." * * * That "the copy of the patent recorded according to law is evidence," * * * "and what is by law made to serve to all intents and purposes, in lieu of recording a patent, must be something of which an official copy under seal will be evidence," * * * "and an official copy is as good as the original."

The case of Ayres *vs.* Stewart, (1 Tenn., 221), was an action of trespass. The grant of the State, under a provision of the statute, was required to be countersigned by the Secretary of State, and the grant was objected to as evidence on the ground that it was not countersigned by the Secretary of State. The Court held that the omission of the Secretary of State to countersign the grant did not invalidate it, and that the provision of law requiring it was merely directory.

In the case of Hickman *vs.* Hoffman (Hardin, 349), the Court held that "the Act of 1748, which makes it the *duty* of the surveyor to record plats and certificates of survey in two months, is directory, and does not create a forfeiture of the right of the individual to the land surveyed, if it is not complied with."

The case of Reed *vs.* Dodson (1 Tenn. 395), is also authority upon the precise point that the provision of the law as to countersigning is directory, and cannot invalidate the grant.

In the case of Phillips *vs.* Campbells, Lessee *vs.* Erwin (1 Tenn. 235), the same question is decided.

In the case of the State *vs.* Batchelder (5 Minn. 223), the Court hold that a patent can only be impeached in an action commenced in equity to set it aside, unless it is absolutely void on its face, or the issue was without authority, or was prohibited by statute.

In the case of U. S. *vs.* Sutter, 21 How, 175, the *titulo* delivered to the grantee was not produced, but the *espedients* contained a draft of the grant which was unsigned. The Court say: "The fact that his name is not attached to this draft does not impair its authenticity under the circumstances of the case," citing Spencer *vs.* Lapsley, 20 How. 264. And speaking of this unsigned paper, they say: "When, therefore, a protocol is found in the Archives the non-production of the original given to the party cannot furnish cause for suspicion or alarm."

In Spencer *vs.* Lapsley, 20 Howard, 264, the Supreme Court held that a contract for eleven leagues of land in Texas, issued before the revolution, was good without the signature of the Governor. And they refer to the case of Secombe *vs.*

Steele, 20 Howard, 102, where they held a decree, not signed by the Judge, to be nevertheless valid. They say: "We do not regard the signature of the Judge as indispensable to its authenticity. The statute that directs the signature must be considered as directory; and other evidence to establish its verity as a record of the Court may be considered." A full description of the grant in Spencer *vs.* Lapsley is given in the dissenting opinion of Justice Daniels at page 275.

In Williams *vs.* Sheldon, 10 Wen, 657, Objection was made to the exemplification of the patent, because the original did not purport to have been *sealed*, and because it was not signed by the Governor or *any one* of the Commissioners of the Land Office.

The Court say, "It appears from an examination made at the Secretary's Office of the Records of Letters Patent issued in 1787–8, to the number of more than 100, that none of these have upon them L.S. or any other character representing the place of the seal, and that several of them have not the name of the Governor nor any other name to them except that of the Secretary or Deputy Secretary, and it also appears that these Records have always been deemed and regarded as the Records of Patents duly issued, and are exemplified as such when called for, in the same manner as those to which the name of the Governor is signed."

"The question then is not whether a patent is valid and will pass the title to land if issued without seal, but whether the fact that in the record of the patent the words L.S. does not appear to designate the place of the seal, is to be regarded as evidence that the original was not sealed. The fact undoubtedly is that the seal was appended to the patent instead of being impressed upon its face; most if not all the early patents were sealed in that way. In copying such a patent the L.S. would very naturally be omitted as no place for a seal corresponding with the original would in fact exist on the face of the patent. Seals to all instruments conveying lands have been in use in this State from its earliest settlement, and it is not to be presumed that it was omitted in so solemn a grant as an original patent, issued by the State under the supervision and direction of its public authorized officers, or that if omitted so defective an instrument would have been recorded. The Act concerning the Commissioners of the Land Office and the sale of unappropriated lands (1 R. L. 292), does not prescribe the form of the patent to be granted, nor direct that they shall be signed by the Governor or any other officer, but leaves these matters to be regulated by the Commissioners of the Land Office: SEC. 5. The Governor has custody of the Great and Privy Seal (1 R. L. of 1801, page 203–5 and 1 R. L. of 1813, page 459–6), and in

practice probably generally signed all patents that were issued, but it is the Great Seal which authenticates the patent, and that I apprehend is *per se* to be regarded as *prima facie* evidence that the patent is approved of by the Commissioners of the Land Office of whom the Governor is one, and has been issued by their direction."

"It is not a valid objection to a patent that it is not signed by the Governor, provided the great seal be attached. It is the great seal which authenticates the patent, and the fact of the seal being affixed is *per se* to be regarded as *prima facie* evidence that the patent was approved by the Governor and issued by his direction."

People *vs.* Livingston, 8 Barbour, 254.

In Doe ex Dem Smalley Jr. and Andrew Scott, *vs.* Roe, 14 Ga., 2 2, plaintiff offered a copy of a grant from the State for the premises in controversy as a foundation to account for the mutilation of the original which lacked the Great Seal of State. Scott then swore that when Smalley gave him the Grant it wanted the Seal, that he had looked for it, could not find it and Smalley Jr. had told him it was lost or destroyed. Plaintiff then tendered the original in evidence, which being objected to the Court required the Copy to be tendered at the same time, to which plaintiff objected. The original and copy being offered

together were objected to because the original was attested by E. H. Pierce, Secretary of the Executive Department, while the copy was attested by E. Wood, S. E. D. The objection was sustained, plaintiff was non-suited and excepted.

The Court say, "We think the varience as to the name of the Secetary of the Executive Department should not have been allowed to influence this question. This signature of the Secretary is altogether an immaterial feature of the Grant. It is the signature of the Governor, and the Great Seal, which gives it effect and validity."

In Hedden *vs.* Overton, 4 Bibb, 406: It appeared that grants of land in the Territory of Kentucky were made by and records thereof kept in the Register's Office of the State of Virginia. The Act of the Assembly of Kentucky (1 Litt 407), for transcribing these records in the Register's Office of Kentucky, and that "all copies of the records and other papers of the said office, duly attested by said Register, shall be as good evidence as the original would be." The Court say: "The third objection taken to the copy offered by the plaintiff to prove his title was, that it had on it no indorsement that the grantee was entitled to the same as required by law.

It is true that the law requires such an indorsement to be made upon the grant; but the probable intention of the Legislature in making this requi-

sition was not as was supposed by the appellant's counsel to give efficacy to the grant, or to confer title upon the grantee, but merely to enable the officers through whose hands the grant was to pass, to know with more convenience than they otherwise could do to whom to deliver it; and whenever the grant was delivered the indorsement was *functus officio*, and could have no other operation.

Besides, we do not understand the law to require the indorsement to be recorded; and what is not recorded need not be copied in order to enable the party to use the copy as evidence * * *.

Upon the whole, therefore, we are of opinion that the objections taken by the defendent to the copy of the grant produced by the plaintiff were properly overruled by the Court below.

Exam *vs.* Brister (6 George, Miss., 391,) was trespass for cutting trees. The Court say: "The first ground of error insisted upon, is the admission of the patent from the State of Mississippi * * * * offered in evidence, for the purpose of showing title in the defendant in error to the *locus in quo*. It was objected to, on the ground that though it was signed by the Governor, with the great seal of the State affixed to it, yet that it was not *signed by the Secretary of State;* but the objection was overruled. The correctness of this ruling depends upon the true meaning of the Act of 15th March, 1852,

(Ch. 16, Sec. 15), under which the patent was issued. That Act provides that, in cases like the one in which this patent was issued, "the Secretary of State shall issue a patent" for the land, "which patent shall be signed by the Governor, and attested by the Secretary of State, with the great seal of State."

The Court held that as the statute stated the mode of attestation to be by the great seal, and as the Secretary of State was the keeper of the great seal, affixing the seal was a sufficient attestation.

Blount *vs.* Benburg, 2 Hay (N. C.) 353.

The plaintiff offered a copy of a grant from the Secretary of State's Office. It was not signed by the Governor. The Court say it cannot be received as the copy of a grant, but it may, as a circumstance, to show that there was once a grant in existence.

In Nelson *vs.* Sims (23 Miss. 383), the Court says: "In our view of the subject, the applications made to the Register for the purchase of these lands, and the payment of the money to the Receiver upon filing with him the certificates of application, were a full performance of all the acts necessary to a completion of the sale or entry on the part of Sims. His duties terminated with the payment of the price of the land to the Receiver. He was not responsible for what afterwards was to

be done by the vendor; his rights, therefore, so far as the United States were concerned, could not be impaired by the ignorance, negligence, or want of fidelity on the part of the Government or its officers."

This is a good grant, notwithstanding the Secretary has omitted to countersign it. The grant is authentic and passes the interest of the State when the Governor puts his signature and the seal of the State. The act as to the countersignature by the Secretary and recording the same is directory, and should the Secretary neglect to do his duty it should not operate to the prejudice of the grantee in making his grant void.

Philips *vs.* Erwin, 1 Overt, 225, Circuit Ct.

The case of Hickman *vs.* Hoffman, Haskie, 348, does not touch the point of countersignature, etc., but it is a strong case as to this presumption *omina rite actu*

Stephens *vs.* Bear, 3 Binney, 32.

Also, Acts referred to Nov. 1777, c. 1, s. 15;
1873, c. 2, s. 15.

The case of Philips and Campell Lessees *vs.* Norris, in the Federal Courts, decided that this countersignature was not essential to the existence of a grant.

Reed's Lessee *vs.* Dodson, 1 Overton, 401.

In the case of Lessee of Welter *vs.* Beecher (3 Wash. C. C. R. 375), it was held "that the entry on the books of the Land Office that the balance of the purchase money had been paid by William Priest, to whom a patent had issued, ought to be considered as evidence that a patent did issue, although it is not produced."

XVI.

The judgment should have been for plaintiff upon the findings, and this Court should direct final judgment accordingly.

"Special findings always control the general verdict, and if the latter is inconsistent with the former the latter must be displaced. If the facts found authorize a judgment for the plaintiff, the judgment should, therefore, be reversed, and the Court below directed to enter judgment for the plaintiff upon the special findings for the premises in controversy, pursuant to the prayer of the complaint." (*Leese vs. Clark*, 20 Cal. 426.)

"When the jury are directed by the Court to find a generol verdict, and also to make a special findings of facts upon questions submitted to them, and a general verdict is returned in favor of one

party, while the findings upon the special issues are in favor of that other party, the Court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings." (*McDermott vs. Higby*, 33 Cal. 489.

"A party is entitled to a finding, and he is also entitled to have a finding upon every issue raised which is essential to the determination of the rights of the case." (Hedden *vs.* Jordan, 28 Cal. 304.) "The finding should consist of a concise, distinct, pointed, and separate statement of each specific, essential fact established by the evidence in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found." (Ib. 305.) "If a discrepancy exists, the mere specific findings of particular facts must control. (Ib. 206.)

"The Court, in reversing a judgment, may render such judgment as the Court below should have done." (Galean *vs.* Neville, 2 Cal. 81.) "If the judgment is erroneour and the findings of fact are such as to enable the Supreme Court to determine what kind of a judgment should have been rendered, it will direct the Court below to render the proper judgment." (Love *vs.* Shartzer, 31 Cal. 487.)

In the case of Argenti *vs.* The City of San Fran-

cisco (30 Cal. 458), the Supreme Court reversed the judgment with directions to the District Court to enfer a judgment which was described and defined; and this was approved in Argenti *vs.* Sawyer, 32 Cal. 414.

XVII.

Miscellaneous--Cases abstracted too late to be inserted in their proper places.

In The People *vs.* Quinn (18 Cal. 122), on a trial for perjury in making oath to a false list of property under the revenue act of 1837, the assessor's memorandum book in which he had noted *in pencil* the property given in by the defendant, was offered in evidence by the prosecution to prove the facts recited therein. The assessor first identifying the book as the list made by him, and that the book, though perhaps admissible to show that there was a list taken by him, was not competent to prove the property therein to be that given in by defendant."

When a Justice of the Peace certifies at the bottom of a paper purporting to be the record of a judgment before him that it is a true copy, it is sufficiently authenticated to be read in evidence

But testitmony from the Justice that he had in fact made no record, is inadmissible. "It would be totally irregular to receive the parol testimony of the magistrate that there was no record of such judgment which he had, in his official capacity, certified to exist." (Wheeler *vs.* Lathrop, 4 Shep. 20.)

"It is well settled that a certified copy of an instrument duly recorded, may be read in evidence without proof of the originals, if it be known to the satisfaction of the Court that the original is not under the control of the party." (1 Peters *vs.* Coleman, 25 Cal. 122; Hurlbutt *vs.* Bretenop, 27 Cal. 50; McMinn *vs.* O'Connor, 00La. 238.) If the instrument be duly recorded this fact of itself furnishes *sufficient prima facie evidence that it was duly executed.*" (May *vs.* Mageaux, 38 Cal. 449.)

An entry of an order in the minutes of proceedings in the county court, or a copy of it, cannot be contradicted by the evidence of the Judge. (Derves *vs.* Rigley, 73 C. L. and E. 469.)

The case of Bours *vs.* Zachariah, (11 Cal. 281) decided that a Notary, after taking and certifying an acknowledgment and delivering the certificate, his functions cease, and he is discharged from all further authority, and cannot alter or amend his certificate.

In *exparte* Randolph (2 Brock 447), it was held "that the account of the petitioner as acting pur-

ser having been once stated and settled at the Treasury Department, the law invests the Auditor with no power to open and re-settle it *of his own mere authority.* The act creates a special and limited jurisdiction, and after the accounts of any of the class of officers on whom it was intended to act have been adjusted, however erroneous, that special jurisdiction is *functus officio*, and any process issued upon a re-settlement of such account is absolutely *null and void.*" "Whenever a special jurisdiction has once executed the power with which it was invested, their power is at an end as to the subject in relation to which it has been executed." (P. 474.)

When the record, certified by the Clerk of the Circuit Court, states that an appeal was taken in open court, no evidence *dehors*, the record can be received to impeach its verity on a motion to dismiss the appeal for want of jurisdiction, etc. (Hudgids *vs.* Kemp, 18 Howard 530.) Certificates and statements of the Clerk, outside of the record, and given since it was certified and transmitted to the Court, could not be received for the purpose. (Ib. p. 534.)

The proper proceeding to amend a patent is by information in the nature of a bill in chancery. (People *vs.* Stratton, 25 Cal. 242.)

In Arnold *vs.* Grimes (2 Clarke's Iowa Rep. 1), the Court held that the Commissioner of the Gen-

eral Land Office could not cancel a certificate of purchase, citing Carroll *vs.* Stafford (3 How. 460), where the Supreme Court of the United States say "when the land was purchased and paid for, it was no longer the property of the United States, but is the purchaser's. He held it for a final certificate, *which could no more be cancelled by the United States than a patent.*

"Letters patent are matters of record. They can alone be amended in chancery by a writ of *scire facis* sued out on the part of the Government, or by some one prosecuting in its name, or by a bill in chancery." (Bruner *vs.* Manlove, 1 Scam. 161.)

"The ancient mode of amending or repealing the King's patent was by *scire facias*, generally brought in the chancery "where the record of the instrument was found." In modern times the Court of Chancery sitting in equity, entertained a similar jurisdiction by bill when the ground of relief is fraud in obtaining the patent, and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered." (Mowry *vs.* Whitney, 14 Wallace 434.)

"The presumption is that the public officers have done their duty in regard to the several acts required by them to be done in granting lands, and therefore, surveys and patents should always be received as *prima facia* evidence of correctness.

This doctrine is expressly held in Jackson *vs.* Marsh, (6 Cowen 281) to wit: that a patent by the State should be presumed to have been issued regularly, and if it be not null on its face, cannot be avoided collaterally in a suit by indivduals. If there is any allegation or pretense that it was issued by mistake or upon a false suggestion, it is voidable only, *and in such case can be only avoided by a direct proceeding to cancel or annul the patent.*" Brady *vs.* Begum, 26 Barb. 529.

"When informed by the action of its tribunals and officers that a claim asserted is valid and entitled to its recognition, the government acts and issues its *patent* to the claimant. This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie." (Beard *vs.* Federy, 3 Wallace 492.)

"Upon all the matters of fact *and law*, essential to authorize its issuance it imparts absolute verity, and it can only be vacated and set aside by direct proceedings instituted by the government, or by parties acting in the name and by the consent of the government. Until thus vacated, is is conclusive, not only as between the patentee and the government, but between parties claiming in privity with either, by title subsequent." (Leese *vs.* Clark, 18 Cal. 572).

"A mere certificate that a certain fact appears of record, without the production of an authenticated copy of the record, is not evidence of the existence of the fact. (*Owen vs. Boyle*, 15 Me. 147.)

"The statute does not make such statement evidence. It is not testimony under oath, nor does it purport to be a copy of any record made by them. These statements can have no more validity than those of private persons unless authorized by law." (*Randall vs. Bradbury*, 30 Me. 258.)

A certificate of baptism, signed by the officiating minister, which does not purport to be an extract from any register kept by public authorities, or otherwise, is not admitted as evidence." (*Purlby vs. Purlby*, 6 Eng. L. & E. Rep. 593.)

"An official certificate is evidence only so far as the matter certified comes within the official duty

or cognizance of the officer." (*Neuman vs. Doe*, 4 How. Miss. 5,641.)

In *Erickson vs. Smith* (38 Howard Pr. R. 467), an action for the loss of life by explosion of a steamboat boiler, a certificate of the inspectors appointed under act of Congress, was put in evidence. The Court held, that it was evidence of the fact of inspection, but it was not evidence of the other facts stated in it, though required by law to be stated, because, "from the nature of the duty imposed by this act it is clear that they were required to state no fact beyond that of inspection alone. In all the other matters, required to be contained in it the certificate consists of the opinions of the inspectors, concerning the condition of the boat, *and of facts necessarily derived from information acquired from other persons.*"

"What the record, itself does declare, is to be made known to the Court by a duly authenticated copy of it; and the law does not permit a recording or certifying officer to make his own statement of what he pleases to say, appears by the record. A mere certificate, therefore, that a certain fact appears of record is no evidence of the existence of the fact." (*McGuire vs. Sayward*, 22 Me. 234.)

"A magistrate, in order to show what a record contains, is not merely to certify what his construc-

tions of the record is. He must give a copy of it, that the Court may judge of its import. His certificat, that it contains any particular fact, is never receivable as proof." (*English vs. Sprague*) 33 Me. 448.)

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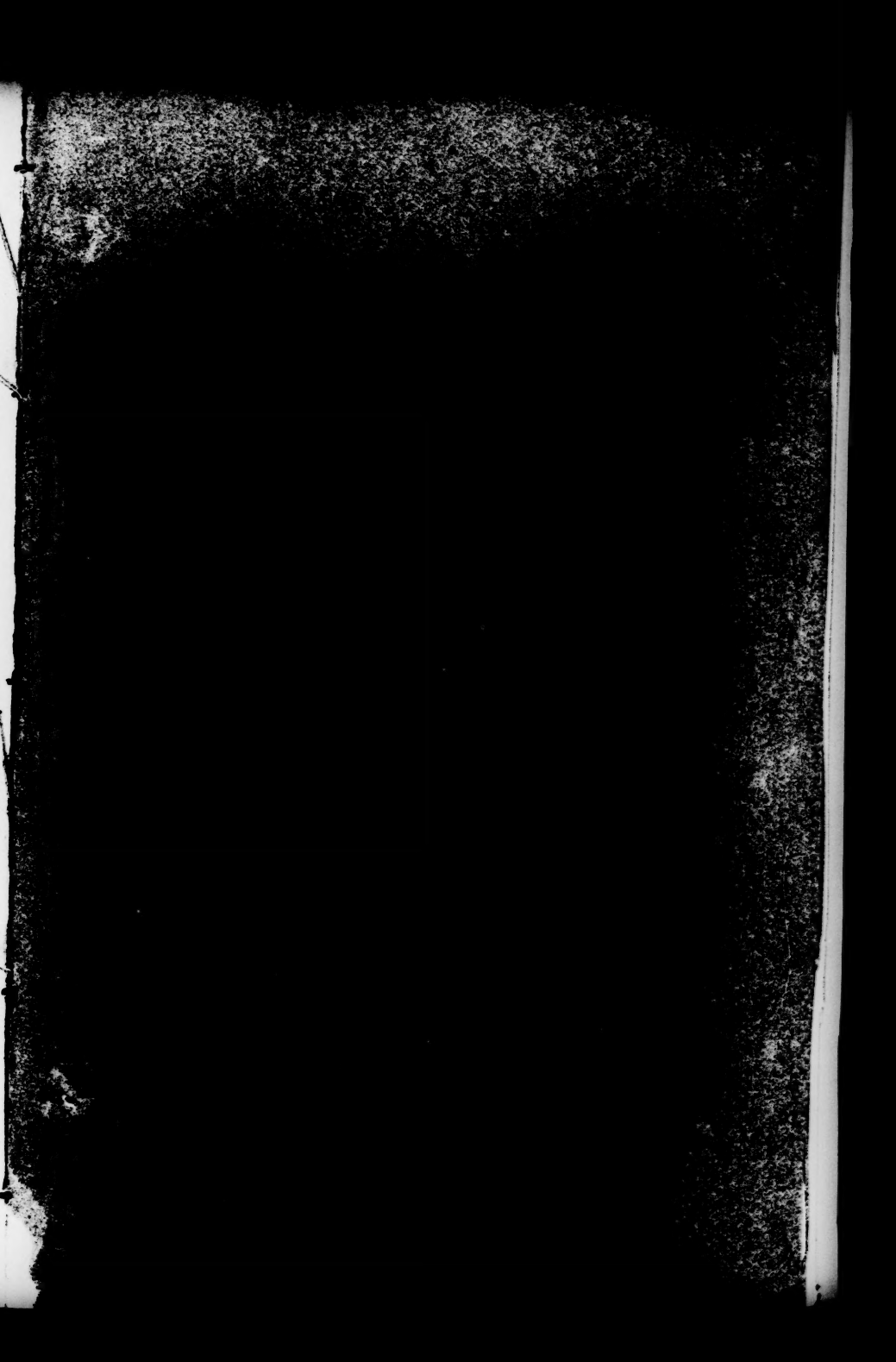


IN THE

Supreme Court of the United States.

WILLIAM McGARRAHAN, PLAINTIFF IN ERROR,

against

THE NEW IDRIA MINING COMPANY, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief of CHARLES P. SHAW *and* HENRY W. CLARK, *of Counsel for the Plaintiff in Error.*

STATEMENT OF FACTS AND ASSIGNMENT OF ERROR.

This was an action of ejectment, brought by the plaintiff in error in a State court, to wit, in the District Court of the twentieth judicial district of the State of California, to recover certain premises, constituting a portion of "that certain real estate and rancho situated partly in the county of Monterey and partly in the county of Fresno, State of California, known as the *Rancho Panoche Grande.*" (Record, fol. 7.)

The cause was tried before a judge without a jury. He gave judgment for the defendant. From the judgment the plaintiff appealed to the Supreme Court of California, which is the court of *dernier resort* in that State, where the judgment was affirmed, and the cause was thereupon removed to this court by writ of error.

The facts, as they appear from the recitals of the record

of a patent from the United States for the said rancho, under which the plaintiff claimed title, and as otherwise found by the judge, are as follows:

In 1853, Vicente P. Gomez, having a grant from the former Mexican authorities of California of a tract of four square leagues of land, which includes the premises sought to be recovered, called "Rancho Panoche Grande," situated in the counties above named, but then called San Joaquin county, filed his petition with the Board of Land Commissioners appointed under the act of 1851, "to ascertain and settle private land claims in California," for the confirmation of his said grant.

The Board rejected his grant as invalid; but on an appeal to the United States District Court for the southern district of California, the decision was reversed and his title under the grant was confirmed. (Pp. 12, 13.)

That decision was rendered on the 5th day of June, 1857, *but the court at the time omitted or neglected to sign the decree of confirmation*, and it was thereafter, on the 5th day of February, 1858, ordered by the court that the decree be signed *nunc pro tunc*, concluding in these words, (p. 13:)

"It is therefore further ordered by this court that the same be signed now for then." (P. 13.)

It further appears from the record that this decision of the United States District Court confirming the grant was affirmed by the Supreme Court of the United States on appeal, after full hearing and advisement at the December Term for 1858. (Pp. 13, 14.)

At the *next term* of the Supreme Court (December Term for 1859) it appears a decree docketing and dismissing *another* appeal that had been taken in the cause *was rescinded*. This rescinded decree seems to have been taken at the December Term for 1858, but neither it nor the rescinding decree appear from the record to sustain any relation to the decree of the Supreme Court finally confirming the grant on the appeal argued and decided at the December Term for 1858, *consequently that decree appears by the recitals in the patent to be a*

full and undisturbed adjudication of this court in favor of the validity of the grant. (P. 14.)

On the 21st day of March, 1861, Judge Ogier ordered a new trial of the cause in the District Court, but afterwards, and on August 4, 1862, that order was set aside by Judge Ogier's successor, Judge Haight.

The feature of the patent, which recites a full and final adjudication of the title by this court, was erroneously disregarded by the court below, and its decision was based upon another part of the instrument, reciting matter from which it was also erroneously deduced that the grant had not been finally confirmed when subsequently patented to Gomez, as hereinafter shown, in March, 1863.

The portion of the patent relied upon by the court below to uphold this view recites that, *on the 25th day of August*, 1862, an order granting *still another* appeal from the District Court decree of confirmation, was applied for and allowed by the District Court, to the Supreme Court. (P. 15.) But that was more than five years from the passing of the decree appealed from, that decree having been rendered on the 5th day of June, 1857, (fol. 74,) and it was therefore too late.

The court, or judge, on discovering that fact—the record still remaining in the District Court, *by written stipulation of the parties, entered on the minutes, that it should remain there, i. e.*, it being stipulated that a transcript for transmission to the appellate court should be withheld—immediately, on a special motion made for that purpose, vacated and set aside the order allowing this appeal, and, at the same time, denied the motion of the United States District Attorney for leave to take an appeal. (P. 15; also see decision of Judge Haight, Appendix "A" of this brief; also, opinion Mr. Justice CLIFFORD, 1 Wall., 701, and 3 Wall., 764.)

The record of the patent also recites that a survey, in due form of law, had been made by the United States Surveyor General for California, and approved by him September 11, 1862, and forwarded to the Commissioner of the General Land Office, with an application by the claimant for the patent. (Pp. 15 to 19.)

The grant thus standing and being confirmed, and the petitioner being entitled to a patent for it, applied for one, which was thereupon duly issued and recorded March 14, 1863, on pages 312 to 321, inclusive, of volume four, kept at the General Land Office at Washington, for the recording of patents of the United States, issued upon California confirmed Mexican grants. (P. 11, fourth special finding.) A copy of the patent, as thus recorded, appears in the findings in the case. (Pp. 12–19.)

It bears the *indicia* of a record of a patent legally complete in every respect, including the seal of the General Land Office, the signature of the President, date of execution, and the clerical mark "Exd.," indicating that it had been compared with the original of which it purports to be an official record, *and it is conceded by the Supreme Court of California to be a record "constituting the original patent."*

The absence of the counter-signature of the acting recorder on the record of this patent would be of no importance, even if there were not a statute of Congress which declares that an exemplified copy of such a record which does not contain the signatures and counter-signatures of the officers whose duty it is to sign it, is evidence wherever offered, *"as if the names of the officers signing and countersigning the same had been fully inserted in such record."* (An act in relation to the exemplification of records of land patents, &c., passed March 3, 1843, 5 United States Statutes at Large, p. 627.)

The patent had been applied for by the plaintiff in error as the successor in interest of Gomez, prior to December 29, 1862, and on that day the Secretary of the Interior, Hon. Caleb B. Smith, granted the application, and in rendering his decision thereon, ordered and adjudged in these words:

"My conclusion is, that the decree of the District Court for the southern district of California, confirming the grant, has become final. The United States has no longer any interest in the controversy; no claim of third parties has been interposed. The suggestion of fraud in the grant, or in the manner of procuring its confirmation, is *res adjudicata;* and I am unable to discover any reason why a patent should not be issued in conformity with the decree of the court and the

survey. You will therefore issue a patent for the land in accordance with the survey as reported by the Surveyor General." (P. 10, first and second finding.)

Afterwards, on March 4, 1863, some delay occurring in issuing the patent, the matter came before Hon. John P. Usher, then Secretary of the Interior, who rendered his decision, and ordered and adjudged as follows:

"I think therefore that the decision of my predecessor directing the patent was correct, and that it should issue. I would advise you, however, to cause to be inserted in the patent, by way of recital, the fact that it was issued upon a survey made under the act of June 2, 1862; and also, by way of greater caution, to insert a provision that the description of the land therein conveyed was to be taken against the United States, or any person making claim to the land as *prima facie* evidence only of the true location of the land granted, and to be modified or avoided in that respect if the same should be found to be erroneous." (Pp. 10 and 11, third special finding.)

Following this decision, and on or about the 14th day of March, 1863, the patent was recorded as above stated. (P. 11, fourth special finding.)

On July 11, 1870, the plaintiff in error demanded an exemplified copy of the record, which was not granted, though he tendered the fees therefor. (P. 11, fifth special finding.)

On July 25, 1870, (Hon. Jacob D. Cox being Secretary of the Interior,) this record was defaced by the entry upon it of a written statement signed by Joseph S. Wilson, Commissioner of the General Land Office, and J. N. Granger, Recorder of the General Land Office, as follows:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *July* 25, 1870.

"The record from pages 312 and 321, inclusive, was made in accordance with the custom at the time, in anticipation of the original being submitted to the officers whose duty it is, under the law, to sign land patents, but an order dated March 13, 1863, having been received from the Acting Secretary of the Interior to suspend the execution and delivery of a patent under the decision of the Department of the 4th of March, 1863, until further advised in the case by the Secretary, the form of patent, which had been prepared, and from which the

aforesaid record was made, was not submitted for signature, and has never been dated, signed, nor delivered." (P. 11, sixth special finding.)

On June 15, 1871, the plaintiff, McGarrahan, presented to President Grant a memorial addressed to Hon. Columbus Delano, Secretary of the Interior, requesting a restoration of the record, upon which President Grant made the following indorsement:

"Respectfully referred to the Secretary of the Interior. It seems to me that if the records of the Interior Department have been changed, as herein stated, they should be restored to the condition in which they were when this administration came into office." (Pp. 11 and 12, seventh special finding.)

The record of the patent as originally recorded March 14th, 1863, *remained unaltered until after July* 11, 1870, and it was not until after that date that it was defaced by writing the above-mentioned statement across the last page, as shown in "Exhibit No. 2," of the findings. (P. 12, eighth special finding, and "Exhibit No. 2," at p. 27.)

A literal transcript of the record of the patent as it now appears with this defacement on it, certified under the hand and seal of Willis Drummond, Commissioner of the General Land Office, was made a part of the plaintiff's cause and findings in the court below, but in offering the document in evidence, his counsel objected to certain extraneous matter incorporated by said Commissioner in his certificate, which the court, sustaining such objection, ruled out as not to be regarded, and such ruling was acquiesced in by the defendants. (P. 12, eighth special finding.)

The part thus ruled out reads as follows:

"And I further certify that the original instrument set forth in the above-named pages of said volume 4 was never executed by the President of the United States, nor delivered to the grantee, and that said original instrument is now on file in this office, but neither it nor the copy thereof in said volume 4 is regarded or treated as a part of the official records of the General Land Office."

This action of ejectment is based upon this patent to the

Rancho Panoche Grande, and was brought by this plaintiff, as the grantee of Gomez, (p. 12, eighth special finding,) to recover possession, and the above-recited facts were proved and found by the said District Court for the 20th judicial district of the State of California, but that court held that the plaintiff had no title or possession, and was not entitled to recover, and that decision was affirmed by the Supreme Court of California, on appeal. *The decision of that court, as appears from the opinion, is placed entirely on the ground that, by the order of appeal allowed on the 25th day of August, 1863, the cause of Gomez v. The United States was removed from the jurisdiction of the United States District Court for the Southern District of California to the Supreme Court of the United States, and the order made thereafter, by the said District Court, vacating and setting aside the order allowing the appeal, and denying the motion of the District Attorney for leave to appeal, was void, and concluding, therefore, that the grant was not finally confirmed, and, consequently, that the patent issued thereafter was void for want of jurisdiction on the part of the executive authorities to issue it. It is of this decision that the plaintiff in error complains, and here assigns it for error.*

Before proceeding to the consideration of the points upon which we rely, and in order to be able to present them with greater brevity and clearness, the indulgence of the court is asked to the following

Statement.

We are admonished, not only by the decision of the Supreme Court of California, but by the brief which the counsel for the defendant in error has filed, in which he alludes to the four reported decisions of this court when, on former occasions, it has had the claim of the plaintiff in error to the lands and mines in question under examination, that it is important that those decisions be not misunderstood. The cases in which those decisions are made, are, The United States *v.* Gomez, 23 How., 326; Same, 1 Wall., 690; Same, 3 Wall., 752, and McGarrahan *v.* The Secretary, 9 Wall., 308.

The record in the cause now before us does not afford any extended narrative of the voluminous facts of the great controversy that has raged for years over the title in question in the legislative and executive branches of the Government, as well as in this court. It is not made up, nor was it attempted to be made up in any way, to correct any former versions of facts that may have appeared in any record on which this court has heretofore acted. The first appearance of this cause in the *reported* decisions of this court is in 23 Howard, 326, in the year 1860. That adjudication arose on a motion made by Attorney General Black, in this court, to rescind its decree docketing and dismissing an appeal, and to revoke a mandate that had been obtained by the claimant for the execution of the decree of the United States District Court, of June 5, 1857, confirming the grant as the final decree in the cause. On the decision of that motion, the cause received the judicial condemnation which has given it the ill-repute, as a case of fraud, that has attended it with fatal results in all the subsequent decisions of this court. Especial attention is therefore asked to the nature of that motion, the circumstances under which it was made, and to the character of the evidence by which it was sustained, and from which the charges of fraud were derived. The decree docketing and dismissing, and the issuance of the mandate, were obtained at the December Term, for 1858. The motion to rescind and recall was made at the *next* term of the court, and was founded upon a mass of *ex parte* affidavits of various persons, including the claimant's attorneys, who had attended to the confirmation of his title in the District Court, the clerk and deputy clerk of the court. These affidavits were entitled in the cause in the District Court, and had been filed there as the basis of some proceedings that were taken, and proposed to be taken, in that court after the cause had been docketed and dismissed by this court, and after its mandate had been issued, *and were designed by the parties preparing them to obstruct and prevent the execution of that mandate.* The motive for this may be found in the fact that at that time it was a part of the public history of this grant that it contained a quick-

silver mine, estimated by Attorney General Black, in his report to Congress, to be of the enormous value of ten million dollars, which was then worked by the defendants in this action. The effect of the mandate of this court, if obeyed by the court below, would have been to summarily eject the defendants from this mine and put it into the possession of the claimant.

Such was the enormous stake at issue, and the instruments for winning it were *ex parte* affidavits, prepared secretly and sprung suddenly with the treacherous aid of the claimants' own lawyers, who were the chief deponents, and those having charge of the machinery of the District Court, under the sanction of the Attorney General himself.

These *ex parte* affidavits and other papers were prepared by and under the supervision of the counsel of the defendant in error, and filed in the court below through his agency. All those affidavits and proceedings were certified by the district judge (Ogier) in what is called a "Book of Exhibits" to this court, *together with a statement of his own*, and were the basis of the motion made by Attorney General Black to recall the mandate, and to rescind the decree to docket and dismiss. On this "Book of Exhibits," and the statement of Judge Ogier, the question was tried in this court, whether or not there had been an appeal allowed, as set forth and duly certified in the transcript filed here, which transcript is *now among the records of this court*, and on it the motion to docket and dismiss was granted. These *ex parte* affidavits were controverted by opposing affidavits and documents, such as the claimant could then produce, absent as he then was from California, in a brief time, but the court became satisfied, on the evidence, that there had been no appeal allowed, consequently, that its decree of the former term, docketing and dismissing an appeal, and issuing the mandate, was void for the want of an appeal to invest the court with jurisdiction over the cause. Thus, on *aliunde* and *ex parte* evidence, wholly *de hors* the record in the cause, and contradicted by it, this adjudication was made, and from it is drawn the narrative given in the opinion of the court, which reflects so unfavorably

upon the claimant's cause. It is submitted that such evidence ought not to have been received in this court for the purpose it was used, as under the previous rulings of the court it was inadmissible to impeach the verity of the record. In Kemp *v.* Hudgins, 18 How., 530, the court said: "Where the record certified by the clerk of the Circuit Court states that an appeal from a decree in chancery was taken in open court, *no evidence dehors the record can be received to impeach its verity, on a motion, to dismiss the appeal for want of jurisdiction, upon the ground that the case has not been regularly brought up.*" Also, in the same case, it was said: "Certificates and statements of the clerk, outside of the record, and given since it was certified and transmitted to the court, could not be received for the purpose of impeaching the record." (Id., 534.) In Bradstreet *v.* Thomas, 12 Peters, 174, it was declared, "There is a safer depository of the adjudication of the courts than the remembrances of judges, and their declaration of them is no proof of their existence." In Holmes *v.* Budd, 11 Iowa, 186–190, it was held that the certificate of the clerk of the District Court will not be received to impeach a record entry. The court say: "The record is better evidence than the subsequent certificate, and must prevail. * * In this transcript he certifies that this judgment appears of record as made upon the 15th day of December, 1859, and this is certified to as being a full and complete copy of the record of said cause." In Wheeler *v.* Lathrop, 4 Shep., 20, it was said: "It would be totally irregular to receive the parol testimony of the magistrate that there was no record of such judgment which he had, in his official capacity, certified to exist." That this evidence, supplied *ex parte* by the defendants in error, in such an exigency as was at the time upon them, when stimulated to the employment of every appliance to save the enormous estate they have ever since held without the pretense or claim even of title, has hitherto received the confidence of this court, has been the claimant's misfortune. Elsewhere, and in other jurisdictions, it is a part of the public history of the country, that he has been enabled to do away with the injurious imputations of those affidavits, because he has been permitted

to exhibit indubitable documentary proofs in support of his charge that the preparation and presentation of them to this court was the result of an unscrupulous conspiracy, involving perjury, forgery on the judicial record of the cause, both by interpolation and erasure, professional treachery, and official corruption and oppression. The subsequent decisions of the Interior Department in 1862 and 1863, which are partly to be found in the record of this case, (pp. 10 and 11, 1st and 2d special findings; see Decision of Secretary Smith, in full, Appendix "B" of this brief,) are public documentary evidence in proof of the integrity of the claimant's case, as also are the two reports and resolutions adopted by the House of Representatives of the Fortieth and Forty-first Congresses, whose Judiciary Committees reviewed all the charges and counter charges of fraud, after taking evidence and hearing arguments for months, in exhaustive reports. (See Wilson's Report No. 33, 40th Cong., 2d sess., appendix "C," of this brief; also, Resolution of House of Representatives, at 3d sess., 41 Cong., appendix "D.")

But in this court, the injurious statements of those affidavits were not only adopted on the motion to recall the mandate, but they have been accepted and adopted in all the subsequent decisions which it has made on questions connected with this Gomez title.

No further proceedings after the recall of the mandate in 1860 took place in this court until February, 1864, when a motion was made by the claimant to dismiss an appeal which the Government had docketed. (1 Wall., 690.) *But in the meantime, and on March* 14, 1863, *the patent here in question was issued, but its execution was concealed and denied by the officials in the land office, and its existence did not come to the claimant's knowledge until July*, 1870, *and consequently it does not appear as an element in any of the subsequent proceedings, until now.* The appeal docketed here in February, 1864, which the claimant promptly moved to dismiss, was founded on Judge Haight's order, granted *ex parte*, allowing the appeal of *August* 25, 1862, which, as is shown by the recital of the patent, he subsequently revoked, *December* 4, 1862, denying,

at the same time, an appeal, on the ground that the time to appeal had expired *June* 5, 1862. The claimant's motion to dismiss the appeal, denied the jurisdiction of this court "to hear and determine the same," 1. Because the five years within which an appeal can be taken had expired before the appeal was claimed or allowed. 2. Because the entry of the appeal was made without authority, *and had been set aside.* 3. Because there was no citation. 4. Because the appeal was not seasonably prosecuted. 5. Because the transcript of the record was incomplete." (See 3 Wall., sub. 3, 762.)

On deciding this motion to dismiss the appeal (see 1 Wallace, p. 690,) the learned judge who wrote the opinion of this court, alluding to a transcript containing the affidavits, on which the recall of the mandate was founded, says, (p. 700:) "Transcript shows that the order vacating the decree (confirming the grant) was passed upon the ground that the decree had been fraudulently obtained." The reporter then adds: "His honor here referred to the particulars as set forth in the order of Ogier, J., *ante* p. 692, and to the proceedings in United States *v.* Gomez, 23 How., 326." Thus are the impressions of those affidavits revived and continued with such effect that they enter as a determining element, as conspicuously appears by the reporter's head-note, to justify a departure from the usual rules of adjudication. (See head-note, p. 690.) Hence it was that the court, acting on the supposed "merits" of the case, decided in favor of its own jurisdiction on the question of the expiration of the time to appeal and the question of citation, (the other objections to the appeal not being then considered,) on the ground that if it had decided against its jurisdiction, the result would have been that the decree of the District Court in favor of the claimant, of June 5, 1857, which it was "not prepared to sanction" would have been left in full force and effect. To avoid such a result, the reporter, reflecting the opinion of the court, attributes the decision that was made. He says: "WHERE THE QUESTION WAS WHETHER A PARTY SHOULD BE HEARD ON APPEAL, AND THE EFFECT OF THE REFUSAL TO HEAR HIM, WOULD HAVE LEFT IN FULL FORCE A

DECREE THAT THE COURT WAS 'NOT PREPARED TO SANCTION.'"

"It was held: 1. That an order to enter up a decree was not to be taken as of the date of a decree entered subsequently "*now for then*," but the date was the day of the actual and formal entry.

2. That the object of a citation on appeal being *notice*, no citation was necessary in a case where, in point of fact, by agreement of parties, actual and full knowledge by the party appellee of the other side's intention to appeal appeared on the record, and *where, moreover, by such a construction as the court was inclined to put on a part of the case, the appeal was taken in the same term when the decree was made.*"

Thus was the time for an appeal extended to the claimant's prejudice, beyond the period of five years, because the court was not prepared to sanction his decree of confirmation; also, for the same reason, it was construed that his decree, actually rendered in the June Term of 1857, was deemed not to have been rendered until the June Term of 1862, more than five years afterwards!!

Though the proceeding before the court was simply a motion to dismiss an appeal, the merits, as derived from the affidavits upon which the former adjudication was based, were considered, and the learned justice, grasping the case in its entirety, from those affidavits, in concluding his opinion, said:

"In view of the *whole* case, our conclusion is, that the motion to dismiss the appeal must be overruled. Effect of the motion, if granted, would be to leave the decree below in full force and unreversed, which is a result that at present we are not prepared to sanction."

The next appearance of the case in this court is reported in 3 Wallace, (p. 752,) in the year 1866, when it came up to be heard on the merits, and also on all the above-enumerated questions of jurisdiction which were again allowed to be urged by the claimant. The opinion of the court, as also an elaborate statement by the reporter, which is poetically colored beyond the requisite necessities of an accurate statement of facts, again refers to the decision in 23 Howard of the motion to recall the mandate, and adopts as fact all the unjust state-

ments of those affidavits. The opinion, in alluding to them, says:

"Affidavits offered showed that no appeal had been taken by the United States, and that the statement that such an order had been made as was exhibited in the transcript, and filed in the case, *was false*. They showed not only that the United States had not appealed, but that a motion, filed by their special counsel for a hearing, was still pending in the District Court." (3 Wallace, pp. 761, 762.)

Again the opinion, alluding to those affidavits, says:

"Circumstances of the confirmation of the claim in the District Court are fully stated in the opinion of this court, when the mandate was revoked and recalled. Comment upon those circumstances is unnecessary, except to say that the confirmation was *fraudulently obtained!*" * * "Party who procured it cannot be allowed to object to its validity as a means of perpetuating the fraud."

All these and similar imputations, the claimant has always denounced as false, and has for years been ready to disprove the same by indisputable documentary evidence now in his possession and within his control, by which he is prepared to demonstrate, that this court has been misled in a gross and scandalous manner by the parties who prepared and preferred the charges contained in those *ex parte* affidavits against his title, or the mode of establishing it.

The next appearance of this case in this court was in 1869, (9 Wallace, McGarrahan *v.* The Secretary.) That arose from an application of the plaintiff in error to the Supreme Court of the District of Columbia for a *mandamus* to compel the Secretary of the Interior to issue to him, as the assignee of Gomez, a patent for the rancho, on the ground that by an act of Congress he had a pre-emptive right to take it by purchase at a certain price, that being one of the rights accorded by law to him as the owner of a rejected grant. The application was granted by the court below, but this court set it aside.

In that case there were no disputed facts. The record only presented the single question of the jurisdiction of this court over the Secretary to control him in the matter of issuing a patent on a case exhibited; but again, the court in its opinion

referred to its three former decisions in this controversy, and again adopted all the injurious statements of the affidavits which were employed to revoke the mandate, (9 Wall., pp. 308, 309,) and with great sternness reflected upon the previous efforts the claimant had put forth to assert his title in this court and the court below, saying: "Founded, as the proceeding in this case is, upon a claim to land which has been three times under examination in this court before the present writ of error was sued out, it is deemed necessary and proper to advert to the views expressed by the court on those occasions in respect to the validity of the claim, and the means adopted to procure its confirmation."

Attention is now called, *in limine*, to these various decisions of this court, and to the fact that they all seem to have been in some degree influenced adversely to the claimant by the impressions derived from the affidavits in question, for the purpose of submitting to the court whether or not those decisions should be extended further and applied to the present case.

THE CASE NOW BEFORE THIS COURT, PRESENTS THE QUESTIONS STATED IN THE FOLLOWING POINTS, ANY ONE OF WHICH, DECIDED IN FAVOR OF THE PLAINTIFF IN ERROR, ENTITLES HIM TO A REVERSAL OF JUDGMENT, AND A RECOVERY OF THE PREMISES IN QUESTION:

First Point.

The appeal order of August 25, 1862, referred to in the patent, was invalid, because it was not claimed or allowed until after the time to appeal had expired.

The *time* within which the defeated party could appeal to the Supreme Court, in these California land cases, from the United States District Court, was limited to *five years* from the *rendering or passing* of the judgment or decree.

United States *v.* Pacheco, 20 How., 261.

The statutes under which this time is to be computed are the Federal Judiciary Act of 1789, which provides, that "*writs of error* shall not be brought but within five years after *rendering or passing* the judgment or decree complained of," and the act of 1803, which makes "*appeals* subject to the same rules, regulations, and restrictions prescribed by law in cases of writs of error."

The decree of the District Court, confirming the grant in this case, is set forth in the patent, and is declared by the court in the decree itself to have been "*made*" *on the 5th day of June*, 1857.

This is stated in the decree as follows: "And it also appearing to this court that heretofore, to wit, on the 5th *day of June*, 1857, at a regular term of this court, holden in tne town of Monterey, State of California, the claim of the appellant in this case *had been confirmed by this court*, but that it had been *omitted by the court to sign the decree of confirmation at the time the same was made.* It is therefore further ordered by this court that the same be signed now as for then.

"Given under my hand, in open court, 5th day of February, A. D. 1858.

"ISAAC S. K. OGIER,
"*U. S. District for the Fifth District of California.*

"Filed this 5th February, 1858, for the 5th June, 1857."

The record in this cause shows no other decree than this, and this appears only by way of recital in the patent.

A judgment is *rendered*, or a decree *passed*, when the court has *pronounced* or declared its decision or final determination upon the rights of the parties, and the time to appeal runs from that date, and not from the time of docketing the judgment, or the filing of the roll, or the signing and filing of the formal decree.

Bank of Geneva *v.* Hotchkiss, N. Y. Ct. App., 5 How. Pr. Rep., 478.
Fleet *v.* Young, (N. Y. Ct. of Errors,) 11 Wend., 552.
Silsby *v.* Foote, 20 How., U. S. Rep., 290.
Board of Commissioners *v.* Gorman, 19 Wall. 661.

Ginilla *v.* Relyea, 32 Cal., 159.
Peck *v.* Courtis, 31 Cal., 207.
California Co. *v.* Patterson, 1 Nev., 150.
Lee *v.* Tillotson, 4 Hill, 27.
1 Curtis's Commentaries, 234.
See, also, Opinion of Judge Haight in United States *v.* Gomez, appended to these points, appendix "A."
Decision of Secretary Smith, of the Interior Department, appendix "B."
Report Judiciary Committee, House of Representatives, 40th Congress, adopted by the House of Representatives, appendix "C."

In the San Pedro case, (2 Wheat., 142,) the court says, after referring to the rules and regulations applicable to writs of error:

"An appeal in admiralty, equity, and prise causes, may be taken at any time within five years from the final decree, or sentence being *pronounced*."

In Yeaton *et al. v.* Lennox *et al.*, 7 Peters, 221, the court held the act of March, 1803, which gives the appeal from decrees in chancery, is subject to the rules and regulations which govern writs of error. Under this act it has always been held, that an appeal may be prayed in the court when the degree is *pronounced;* but, if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.

In Whiting *et al. v.* The Bank of the United States, 13 Pet., 15, the court hold:

"The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree as final upon those merits, as soon as it was *pronounced*."

In Bank U. S. *v.* Daniel, 12 Pet., 51, 52, the court decided, that if the sum claimed, with interest thereon to the date of the *pronouncement of the decree*, amount to $2,000, then the Supreme Court would have jurisdiction; but *aliter*, if to make

this amount interest had to be computed beyond the day of *pronouncement*.

In Skip *v.* Harwood, temp., Lord Hardwick, (3 Atkins, 565, marginal,) the court held, that the decree took effect from the *pronouncement;* and if a party attends a cause, and after hearing the *decree pronounced*, does any act in contravention to it, he is guilty of contempt, and liable to be committed to the Fleet.

In Bates *v.* Delavan, the court hold: "The direction to prepare a decree of foreclosure, in conformity with the decision of the court, I presume, means nothing more than that the decree shall be drawn up in the proper form, to be signed by the judges and enrolled; *but a formal decree in equity is not absolutely necessary to its validity as a matter of evidence.*" (Winans *v.* Dunham, 5 Wend., 47.)

Without regard even to the acts of 1789 and 1803, specially controlling the subject, it will be seen, according to the established practice of law and equity, that if the appeal could be taken on the day the decree was rendered or pronounced, the time to appeal then commenced, and terminated in five years thereafter.

The decree is the act of, and is created by the court. The entry, or enrollment and signing, is a mere formal method of preserving the pronouncement or rendering of the decree. Unless specially required by statute, the decree is as effective without as with the signing.

It was held by Judge Ogier, of the United States District Court, (see 23 How., 336,) by whom the decree of confirmation in this case was rendered, that the right of appeal dated from the *June* Term, 1857, when he *announced* his decision of confirmation. Indeed, he professes to have been at one time in doubt if it would be proper to allow an appeal in these California land cases at a term *subsequent* to the term at which the confirmation took place; *and, for that reason*, he questioned if the right of appeal in *this* case did not expire with the *June* Term of 1857, the 8th day of June being the last day of the term, and the confirmation having taken place on the 5th day of June. Nor does he claim to have had his

doubts resolved on this point, when, in the *following December* Term, an application for an appeal was made, (the famous appeal of March 15, 1858, see 23 How., 326,) but, on the contrary, he claims to have held that application for an appeal under advisement until this court had ruled on the question in another case then pending before it. Thus, when it was for the interest of the opponents of the claimant's title to deny that an appeal had been allowed March 15, 1858, Attorney General Black came into this court, claiming, by the certificate of Judge Ogier, that it was fixed upon his (Ogier's) mind that the right of appeal accrued at the *June* Term of 1857, when the decree of confirmation was made; and that an appeal not having been taken at that term, the judge was in doubt as to his right to allow an appeal at the subsequent term. This is alleged to be Judge Ogier's means of especially remembering and knowing that he had not allowed the appeal of March 15, 1858, which was in the next term of the court after the rendition of the decree. Mr. Justice Wayne, in his decision, adopts this narrative of Judge Ogier, and seems to be fully impressed with the suggestion, that it was Judge Ogier's conviction that the right of appeal accrued at the June Term of 1857, which expired June 8, 1857. (See 23 How., 336.) That being the case, the five years' time to appeal had already expired on August 25, 1862, when the next appeal is claimed to have been taken by the order of that date allowing it.

It has been, and probably will again be, claimed, by the counsel for the defendant in error, that this court held, in the case of the *United States* v. *Gomez*, 1 Wall., 690, to the contrary. A mere reference to the head-note might lead to that conclusion. But, if it is so stated in the head-note, the statement is not warranted by anything in the case. The judge delivering the opinion of the court in that case was evidently in some manner misled as to the facts, and, in his opinion, (page 699,) recites facts which *the record here before the court does not show.* There are no such facts in this record, or now before this court. *There is no suggestion of a fraudulent decree in this record; but to the contrary it is ex-*

Haines *v.* Paxton, 5 Minn., 443.
Slicer *v.* Bank of Pittsburgh, 16 How., 579.
Gray *v.* Brignordello, 1 Wallace, 627.
Fishmonger Co. *v.* Robertson, 3 Manning, Granger & Scott, 970.
Donn *v.* Lewis, 11 Vesey, 601.
2 Daniels's Chancery Practice, 1219, 1220, marginal.
Swayne *v.* Naglee, 17 Cal., 127.
Smith *v.* Clay, reported in note to Delarsine *v.* Brown, 3 Brown's Chancery, 637, (marginal,) top page. House of Lords affirms 1 Brown Parliamentary Cases 48-3. See Judge Haight's opinion appendix A. p-69.

In Gray *v.* Brignordello, 1 Wall., 627, Mr. JUSTICE DAVIS held, "A decree, *nunc pro tunc*, is always admissible where a decree was ordered or intended to be entered and was omitted to be entered only by the *inadvertence of the court;* but a decree which was not actually meant to be made in a final form cannot be entered in that shape *nunc pro tunc* in order to give vitality to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory."

An order or entry so made is and has precisely the same effect as if it had been made on the prior day when it should have been made. This judgment, then, was a judgment of June 5th, 1857; this record shows no other. That judgment is the judgment appealed from. If that was not appealed from, there was no appeal from any judgment at all. In any view that can be taken of it, the appeal was brought after the time to appeal had expired.

Third Point.

But suppose the order allowing an appeal was granted before the time to appeal had expired; that order was afterwards vacated and set aside by the same judge who granted it, and thereafter there was no other appeal allowed. There was then no appeal in the case when the patent was issued. But the Supreme Court of California, in this case, held that the judge of the District Court, after allowing the order of appeal, could not vacate or set aside that order, and that the order revoking

it or setting it aside was a nullity. That position cannot be maintained; courts having control of their own records, may revoke or vacate any order improvidently made or caused by inadvertence, mistake or fraud.

The decision of this court in another aspect of this very controversy, see United States *v.* Gomez, 23 Howard, 340, *supra*, is a conspicuous instance of how far the courts will go in this direction. In that case, the court, upon *ex parte* affidavits, which were contradicted by the official certificate of the clerk, annulled its own decree of a *former* term, docketing and dismissing an appeal, such affidavits having *satisfied* the court that no appeal had been allowed to it from the District Court, and, consequently, that it had acted without jurisdiction in granting the decree of dismissal. Appellate Courts have not ordinarily jurisdiction to revise their own judgments or decrees after they have become parchment, but if this court could review and set aside its decree of a former term on the ground of mistake, improvidence, or that a fraud had been practiced upon its confidence, whereby it had been induced to exercise a jurisdiction where it had none, Judge Haight could also recall or vacate an order of appeal, which he had allowed improvidently after the time to appeal had expired, and when he had no jurisdiction to grant one.

The case of *Briggs* v. *Brown* in the old Supreme Court of New York, 6 *Wendell*, 535, is not so conspicuously extreme as that of Gomez, but it approves, as a matter of course, the decision that a writ of error, if improperly allowed—in that case allowed before bail in error was perfected—should be *superseded* without notice even to the plaintiff *by the commissioner*, (*locum tenens* of Supreme Court Judge at Chambers,) *who allowed it*. When the order of appeal, in this case, of August 25, 1862, was set aside, neither the record in the cause nor a transcript had been removed or transmitted to the appellate court. The record wholly remained in the District Court. This appears by the motion made at the same time by the district attorney for leave to appeal. (Record, p. 15.) By that new motion for another appeal, he recognized that the District Court had not parted with its jurisdiction.

That motion was a concession of the fact that he had taken nothing and claimed nothing by the appeal order of August 25, and that he had abandoned it and relied upon the success of a new application for leave to appeal, which was denied. All that is known of that order of appeal in this case, arises from the fact that there is a recital in the patent, that an order setting it aside and denying another application for leave to appeal, was made. (Record, p. 15.)

It is only mentioned to *announce* its extinction, and with it the extinction of the right to have an appeal. The grounds for setting aside that order of appeal are not stated in the vacating order, nor do they appear elsewhere in the record; but they must, in this absence, *be presumed to have been adequate.* If, for any cause or under any circumstances whatever, it would have been proper to set aside that appeal order, we are at liberty to assume such cause or circumstances existed and justified the court in declaring it a nullity. Every presumption favors the legality of the court's action. *Omnia praesumuntur rite et solenniter esse acta.*

Broom's Maxims. See cases cited.
Carman *v.* Pultz, 21 N. Y. R., 547.
Bellows *v.* Sackett, 15 Barb., 96, 104.

The appeal is not shown to have been *perfected* by the service of citation. There was nothing of it but a mere naked order allowing it. That order might have been obtained at chambers from the judge *ex parte*, and in violation of stipulation between the opposing parties, *as was the case*, or it may have been granted by mistake, or on the false suggestion of appellant's attorney that the appellee waived citation or other notice, or it may have been granted under a misapprehension as to when the time to appeal had expired, and after that time, (as was the case,) or it may have been granted on the suggestion of the existence of a stipulation between the parties that the appeal should not be *perfected* or *prosecuted* without first hearing the appellee on some question to be submitted to the court that involved the right of the appellant to take an appeal; or, the court may have acted in ignorance of what is shown by the

recitals of the patent in this record before us, viz: *that there had been one appeal already, which the Supreme Court had fully and finally heard and adjudicated*, by which the case, as a judicial proceeding, was finally ended in every court. (Record, p. 14.)

There are various predicaments that may be surmised, in which the elements of fraud, improvidence, and mistake, one or all, united to induce the judge to allow such an order, and if any such predicament would justify that order's revocation by the judge on discovering the true situation, with notice, as was done in this case, or without notice, as was done in the New York case above quoted, (Briggs *v.* Brown,) it is to be assumed that that predicament existed and afforded the justification of his action.

This very question of the right of the court to revoke the order allowing an appeal, has been before this court in *Ex parte Roberts*, 15 Wallace, 384, where it was decided that the allowance of an appeal to it by a court below, does not necessarily remove a cause beyond the jurisdiction of the court below so that it is disqualified from "superseding" or vacating its allowance of the appeal. *That decision should settle this question.* It cannot then be controverted that the Supreme Court of California erred in holding to the contrary, and as its decision of this case is put entirely on that ground, its error calls impressively for a reversal of that judgment by this court.

Fourth Point.

The order revoking the appeal was made, and it was acquiesced in by the district attorney,—that was enough to conclude him. Until he got rid of that order, which he never did, his order allowing an appeal was revoked, and there was no appeal. All orders of court, however obtained in a cause, are operative until revoked.

Starr *v.* Francis, 22 Wendell, 634, 635.
Goold *v.* Root, 4 Hill, 554, and *cases there cited.*

An order revoking an order allowing an appeal in precisely

such a case as this, forms no exception to this rule. This court held, in the case of *ex parte Roberts*, 15 Wallace, just cited, where it, speaking by the CHIEF JUSTICE, said of an order revoking an appeal: "A new order was necessary to get rid of its effect. As long as it remained on record no question could be made of its operation."

In Rex *v.* Wilkes, (4 Burr, 2571,) Yates, Justice, said:

"The order of a judge is subject to an appeal to the court, *but if acquiesced under*, it is as valid as any act of the court * * the validity of the judge's order can be impeached only in two ways, either by appealing to the court to set it aside, or, if made in vacation, by applying at the next term to set aside the proceedings." *Mansfield*, Chief Justice, held to the same effect in Wood *v.* Plant, (1 Taunt., 47 C. P.)

In Goold *v.* Root, cited above, this question was elaborately considered by Cowen, J., who said:

"And I am not aware of any principle which authorizes a party to treat an order as a nonentity, merely because a commissioner, (*locum tenens* of a Supreme Court Judge at chambers,) is forbidden to grant it, or a party is forbidden to apply for it. It may be said of every order improvidently granted that the party and officer have done what the law has forbidden. *But to allow, as a consequence, that it may, therefore, be disregarded, would be letting in a principle under which every judicial act might be questioned collaterally.*"

The same judge, speaking in the same case of the effect of revoking an order, says the revocation relates back to the original order, and is "*the same thing as an original refusal.*"

Tested by these authorities there never was an appeal allowed from the decree of the United States District Court confirming the Gomez grant. The most the record or evidence in this case shows is, that the Government commenced or attempted to bring an appeal, and went so far as to get an order allowing an appeal, but that being too late, or it having been held to be too late, and the order allowing it having been revoked, the Government acquiesced, and nothing further was done.

An appeal, even where a party has a right to it, and has

taken steps toward perfecting it, can be waived or abandoned, and that would be the effect of what was done and omitted to be done in this case if the appeal ever was good.

Aside from the decision of the Supreme Court of California, which treated the order revoking this order of appeal as a nullity for want of jurisdiction in the court to make it, the only other excuse that has ever been offered for ignoring that order of revocation, is to be found in the brief of the counsel for the defendant in error, where he claims that the United States District Court had no power at a *subsequent* term to set aside an order of appeal granted at a *previous* term. This objection would not suffice, even if the illegality of an order would justify disregarding it. That rule of law as to effect of expiration of term, which ought ever to be regarded as inflexible, (but which has been flagrantly disregarded to the claimant's prejudice so frequently in this controversy,) when it relates to final decrees and adjudicated orders in a cause, has no application to an order that may be granted *ex parte*, without notice to the opposite party, as was the order allowing this appeal. The facts relating to the granting of that order and to its revocation are not disclosed in the recitals of the patent nor any other part of the record of this cause, but all things done by a court—being presumed to have been done properly and from a proper motive—we are at liberty to infer, as suggested in the preceding point, that any state of facts which could justify the revocation did exist, and was the ground of its revocation. We are fortunately not driven to invent such a state of facts. Enough of the history of that order and the order revoking it; is told in Mr. JUSTICE CLIFFORD'S opinion in the Gomez case, (1 Wall., p. 701,) to show the inapplicability of the rule as to the effect of expiration of term, which the counsel has invoked. The learned JUSTICE says:

"Claimant *at once* signified his intention to move the court to set aside the order granting the appeal, and thereupon it was stipulated and agreed between the parties that all further proceedings should be stayed until the next term of the court. Notice in writing was accordingly given by the claimant that

he would submit such a motion *at the next term at the opening of the court.*"

Again, the same learned JUSTICE, in another opinion in that same case, (3 Wall., p. 764,) gives this version of the same order of appeal and its revocation:

"Order allowing the appeal in this cause was entered on the 25th day of August, 1862; but *on the 6th day of October following, a stipulation was entered in the minutes that the transcript* should be withheld until the next term of that court, in order to give the claimant an opportunity to move the court to set aside the order of appeal. Such motion was accordingly made by the claimant on the 1st day of the succeeding December, and on the 4th day of the same month the court directed that the order allowing the appeal should be vacated and set aside."

These opinions of Mr. Justice Clifford also further show:

1st. That no *citation* was ever served, or even issued or ever pretended to be issued, on this appeal. (1 Wallace, subdivision II, pp. 700, 701.)

2d. That the transcript, which, by the stipulation of October 6, 1862, was *agreed* to be withheld until after the motion to set aside the order of appeal was decided, *was so withheld*, notwithstanding repeated efforts of the United States District Attorney, in flagrant violation of that stipulation, to induce the clerk to furnish one. These attempts made upon the integrity of the clerk who had recorded the stipulation on the minutes of the court, and was bound to see it faithfully observed, are noted by Judge Clifford. He says:

"Appellants demanded the transcript on the *tenth* day of *October* next after the appeal was allowed, and the clerk agreed that it should be prepared and delivered. Failing to obtain it, they, on the *second* day of *December* following, again demanded it, and then, for the first time, were informed by the clerk that he would not furnish the document." (3 Wallace, p. 764.)

By an oversight of the relation of dates, the learned judge failed to observe that it would have been a flagrant breach of official faith on the part of the clerk, (as it certainly was a gross breach of official and professional faith on the

part of the law officers of the Government to ask it,) if he had on the 10th day of October, 1862, furnished a transcript, when he had, *only four days previously*, recorded on the minutes of the court the solemn stipulation of the parties that the transcript should be withheld until the result of a motion, to be heard in December following, should decide whether there would be any appeal allowed in the cause. Owing to this oversight, the learned judge incorrectly imputes culpable contumacy to the clerk for keeping the obligation of the stipulation, and credits the law officers of the Government with commendable zeal by their repeated efforts to induce him to violate it. (3 Wallace, p. 764, 765.)

3d. That after the order of appeal had been revoked, both the clerk and the district judge (Judge Haight) refused the Government a transcript, and Judge Haight, as Mr. Justice Clifford observes, "reiterated his opinion, that no appeal was pending, and remarked that the procuring copies for the United States in such a case was a fraud upon the Government, and was not to be tolerated." (3 Wallace, p. 765.)

4th. That no transcript of any sort was filed in this court to revive and validate this *ex parte* revoked order of appeal until the "record was filed and the cause docketed, on the 29th day of February, 1864," *which was in the second term after that order of appeal was allowed.* (1 Wallace, p. 762.)

In addition to this, the records of this court (in which is preserved the dates of the opening and adjournment of the terms of the United States District Courts) show that August 25, 1862, when this *ex parte* order of appeal was granted in the District Court, was the *last day* of the *June* Term of that court, the next regular term being the *December* Term.

It is submitted, from these facts, how complete was the justification and the power of Judge Haight to set aside that order of appeal! And this, too, independent of the fact that the time to take an appeal had expired.

He had granted that order—

1. On the *ex parte* application of the District Attorney, in the absence of the claimant or his representative, years after the final decree had been rendered.

2. In the absence of *citation*, and none was ever served or issued, nor has citation ever been waived or dispensed with, save by the construction Mr. JUSTICE CLIFFORD, in his opinion, (1 Wallace, 693-701,) placed upon the motion of the claimant to set aside the order of appeal, the learned justice holding that the bringing of that motion implied *admission* of full notice of the allowance of the order of appeal, and made a *further* notice by a formal citation unnecessary. A strange result has therefore followed the claimant's motion to set aside that order of appeal. Though he gained his motion, his success was ignored by this court, and the vacated order was treated by it as a still subsisting order, *and his success in getting it vacated was held to operate as a waiver of citation*, (1 Wallace, 701,) and thus to subject his case to the jurisdiction of this court when it otherwise had none! A jurisdiction founded upon the vocation of the order of appeal!!

3. No transcript of the record in the cause was filed in this court, or even furnished. And as soon as the claimant heard of the allowance of the order, he "*at once*" took measures to set it aside, and the District Attorney appeared with him in open court and stipulated on the minutes that the transcript should be withheld until the motion to set aside could be heard. This stipulation and the consent it contained of the parties to submit the question of the right to an appeal to the decision of the court at the December term, with a stay of all proceedings in the meantime, *was equivalent to the District Attorney, turning the order of appeal which he had obtained into an order to show cause why an appeal should not be allowed*; and the order being vacated on the hearing of the motion, and an appeal being denied, and all further attempts to appeal having been abandoned, there never has been a valid appeal in the cause.

It is evident that the mere allowance of an *ex parte* order of appeal under such circumstances did not *perfect* the appeal.

The attempt to obtain an appeal ended in the denial of an appeal, and there the matter rested, as shown by the record before us.

But it is claimed that this court has ruled on this very

1. *An appeal having been allowed, but the record still remaining in this Court, whether the Court could vacate the order allowing the appeal from the final decree, no objection being made to the jurisdiction, and the question coming up as on an application for the allowance of an appeal, I held that the motion could be entertained.*"

matter and decided in the case of the United States *v.* Gomez, (3 Wallace, 763,) that the order vacating the order of appeal was a nullity, and in no manner affected the validity of the order of appeal. If that be so, then the Gomez case is in direct conflict with the later case *ex parte* Roberts, (15 Wallace, *supra*,) and should be overruled; for in the Roberts case it is distinctly held, that just such an order was valid and effectual to set aside an order of appeal, and that, "as long as it remained on record, no question could be made of its operation," and that its effect could only be gotten rid of by another order of the same court, which, of course, might be compelled in a proper case by *mandamus*.

In that case, the question was brought up before this court on the return of the judges of the Court of Claims to a *mandamus* to compel them to proceed and hear the relator's motion for a new trial.

The judge's return set forth, among other facts, that the relator, pending his motion for a new trial, had obtained an order allowing an appeal, and though he had subsequently obtained another order vacating the order of appeal, still the vacating order was a nullity, for the reason that the order of appeal had transferred the cause beyond the jurisdiction of their court and put an end to their power over it, just as is claimed in this case. But the return of the judges to the *mandamus* disclosed that the order allowing the appeal had been improvidently granted and had been promptly vacated on application. No element is wanting in the case at bar which was present in that case and justified the vacation of the appeal, and made that vacation an effectual and binding order, which, by relation, operated as an original refusal of the appeal. The same consents and stipulations of the parties are common to that case and to this; also the same promptitude in moving to set aside the appeal order. No changes had taken place in either cause since the appeals had been allowed, and in both cases the records wholly remained in the court below, and the transcripts had not been filed in this court, and no citations had been issued.

This case of Roberts is solely addressed to the consideration of this one question, and is an indisputable authority on it, and is relied upon to justify and make effectual Judge Haight's order setting aside his order of appeal of August 25, 1862. Nothing to the contrary of this was ruled in the Gomez case. *The power of Judge Haight to vacate the order of appeal, under the special circumstances of the case, or under any circumstances, was not considered.* That was one of the questions that escaped the observation of the court. This is another reason why that case cannot be regarded as *res adjudicata* on that question. In that case it came before this court on the motion to dismiss the appeal. Five grounds for that dismissal (among which this was one) were urged; all of which denied the jurisdiction of the court "to hear and determine the same," in words and *figures*, as follows: (1 Wall., 694; 3 Wall., sub. 3, 762.)

"1. Because the five years within which an appeal can be taken had expired before the appeal was claimed or allowed.

"2. Because the entry of the appeal was made without authority, *and had been set aside.*

"3. Because there was no citation.

"4. Because the appeal was not seasonably prosecuted.

"5. Because the transcript of the record was incomplete."

The motion to dismiss the appeal was denied, (1 Wall., 694,) but the learned JUSTICE who wrote the opinion of the court did not allude to the *second* ground of the motion, as he concedes in a subsequent decision in the case. (3 Wall., 763, sub. 5.)

He says, in that subsequent opinion: "Special mention was not made of the *second* question presented in the motion, because what was said by the court in disposing of the first question rendered any further remarks upon that subject unnecessary. *Express statement of the opinion is that the appeal to this court was allowed on the day therein specified.* * * * *Conclusion therefore is that the case is regularly before the court, and all the motions to dismiss are overruled.*"

This is all there is said by this court on the question of the power of Judge Haight to vacate the order of appeal, and the effect of such vacation. It is manifest that the learned JUS-

TICE did not decide, nor undertake to decide, anything further than that an appeal had been allowed, *without considering the effect of the order setting it aside*; so that there is to be found no ruling of this court on that question in conflict with the deliberate resolution of the court in *Ex parte Roberts, supra*. It is evident that the court in the Gomez case did not consider, and did not undertake to consider, the efficacy or propriety of Judge Haight's order setting aside the order of appeal, and refusing an appeal; for the learned JUSTICE says in his opinion:

"*Mandamus unquestionably is the proper remedy* where the appeal is refused, and it is an appropriate remedy to compel the production of a transcript. Strong doubts are entertained, however, whether it would have been an adequate remedy in this case, because it is more than probable that if the motion had been made, the affidavit showing the refusal of the clerk to furnish a copy, (transcript,) *would have been met by counter affidavits showing that the appeal had been vacated, and in that state of the case it would have been difficult to decide what was right and proper between the parties, without the opportunity of inspecting the record.*"

It is here avowed that an unusual course was pursued, and that its effect was to avoid inquiry into the special circumstances attending the vacation of the order of appeal. A *mandamus* requiring the clerk to furnish a transcript or the judge to allow an appeal would have doubtless brought out a full statement of all the facts attending the vacation of that order of appeal, "the counter affidavits showing that the appeal had been vacated" might have reversed the dark shading of the judicial picture of Gomez *v.* The United States, and shifted the black shadows of fraud, corruption, perjury, and forgery from the claimant's side of the case to the side nominally held by the United States, but actually by the New Idria Company. It must be conceded that the claimant, when contending that that order vacating the order of appeal was valid, was entitled to have the opportunity to show *the special circumstances* under which it was made, especially if its efficacy or nullity depended upon those special circumstances as every such order does; and if he was denied the usual

and "unquestionable remedy of *mandamus*" by which he alone could get before this court the facts and circumstances which would justify that vacation, as did the relator in *ex parte* Roberts, he can claim that he was denied a hearing on that vital question which lies at the foundation of all the jurisdiction this court has exercised over this case. The refusal of the clerk of the District Court, with the approbation of Judge Haight, to furnish a transcript both *before* and *after* the decision revoking the order of appeal, though justified by a stipulation between the parties, which was entered on the minutes, and by that decision, is reflected upon by Mr. JUSTICE CLIFFORD, who, in commending the efforts of the law officers of the Government to obtain a transcript, notwithstanding that stipulation that it should be withheld, and that decision that there was no appeal in the cause, says: "Six times the demand was made of the clerk for the transcript, and the request was as often refused. Such demand was made by the special counsel of the United States and by the district attorney and by the authority and direction of the Attorney General. Throughout the clerk refused to furnish the transcript, but finally consented to furnish the Attorney General a copy of each paper in the case; and those separate papers, it is understood, were appended together and duly certified by the district attorney, as appears in the record." (3 Wall., 765.) The learned justice indicates the ground upon which Judge Haight justified the refusal to furnish a transcript to the claimant after the appeal had been vacated and denied. He says Judge Haight "reiterated his opinion that no appeal was pending, and remarked that the procuring copies for the United States in such a case was a fraud upon the Government and was not to be tolerated." (Ibid. *Also see Judge Haight's letter to Attorney General Bates, Appendix E; The Clerk Wheeler's letter to Attorney General Bates, Appendix F.*) The question arises here, was not Judge Haight correct? Was there any longer a subsisting order of appeal? Was not the suggestion from him that there was no appeal, one that ought not to have been ignored or disregarded? The question as to whether or

not there was an appeal, especially if the order revoking the order of appeal depended for its efficacy upon the special circumstances attending that revocation, could only be fairly brought up by *mandamus*, because in that way, and that way only, could Judge Haight and the clerk Wheeler have made a return of the facts by "counter affidavits, showing that the appeal had been duly vacated." On that return this court would have been enabled to judge whether or not Judge Haight's vacation of the order of appeal was such an exercise of power as was warranted by the facts and circumstances of the case.

It is to be regretted that this opportunity was denied, for then the true history of this controversy would have been spread upon the records of this court, and this cause would, long years since, have been understood. *But every presumption should favor him upon whose lips silence has been enforced.*

Fifth Point.

Even if the recital in the patent did not show that the order of appeal of August 25, 1862, had been vacated and set aside, there is nothing in the patent, or any other portion of the evidence in this case, to show that that order resulted or ripened into an appeal, *or was ever presented to this court.* An attempt to appeal, which fails, or wants the main elements that constitute an appeal, is no appeal. This court has no authority to take jurisdiction of a cause on a mere naked order of the court below, entered on the minutes, allowing an appeal. *It will not assume the existence of an appeal on such an order alone.* No jurisdiction attaches, (if the appeal be not taken at the same term the decree is rendered,) without citation duly signed, served, and returned, with proof of service; nor without the filing of transcript at the term next succeeding the allowance of the order of appeal.

To give this jurisdiction, the citation, with proof of service, can no more be dispensed with than a transcript, and neither can be spared—*not even if the parties consent to waive them.*

To constitute an appeal and make it operate as such under

the judiciary acts of 1789 and 1803, it must be shown on the face of the transcript that the order of appeal was allowed by the court, accompanied by a citation, fully set out, duly issued, signed by the judge, and evidence of service on claimant or his attorney shown. The Supreme Court had no jurisdiction without those prerequisites—the order of appeal not having been taken at the June term of 1857, when the court rendered the judgment. The only evidence of an appeal at all is found by the recital in the order of the court rescinding the order of appeal, *where it is only incidentally referred to;* but that does not constitute an appeal under the above acts, and they are the only acts that govern appeals in these land cases.

Of the three indispensable requisites to an appeal,—viz: 1st, an order allowing it; 2d, a citation; 3d, a transcript,—only one had been secured by the district attorney, viz., the order allowing any appeal. The other two were as essential to the taking of his appeal as the order.

The citation could not be supplied by any substitute, and its absence was a fatal defect in the appeal proceedings, which thereby became ineffectual for any purpose, and left the appeal order simply an order only entered in the clerk's minutes as the beginning of a proceeding never completed. (Castro *v.* United States, 3 Wall., 49, *and cases there cited.*)

This case of Castro was argued at the same term, and is reported in the same volume with that of Gomez. The point decided was the *necessity* of dismissing an appeal where no citation was issued at the time of its allowance, returnable at the next term of the Supreme Court, though one issued subsequently. The appeal was dismissed, *although the order of appeal was taken in open court, and allowed at a time when the district attorney, the counsel for the appellee, was present.*

Chief Justice Chase, in deciding the case, said:

"The appeal was allowed on the 11th of November, 1864, and the allowance with a citation to the adverse party duly served and a copy of the record, should have been sent here at the next term. *This was not done, and the appeal, therefore, became void.* THE FACT THE DIS-

TRICT ATTORNEY WAS PRESENT IN COURT CANNOT CHANGE THIS CONCLUSION. *We are not prepared to admit that the mere presence of counsel in court at the time of the allowance of appeal at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance would dispense with the necessity for a citation.* * * * *A citation, even if issued and served contemporaneously with the allowance of the appeal, would have availed nothing, because of the omission to make the required return to the next term. If this appeal, therefore, is to be disposed of under the acts of* 1789 *and* 1803, *as interpreted by this tribunal, it must be dismissed.*"

Here is a case where the allowance of appeal was made in the *presence* of the counsel for the appellee, and thus *notice*, of the appeal, was brought *directly* home to the appellee at the very moment of its allowance; and yet, as the order of appeal had not been taken at the same term the decision sought to be appealed from was rendered, and no citation was issued returnable at the next term of the Supreme Court at the time the order of appeal was granted, the appeal was dismissed. The issuance and service of citation are neither recited as facts in the Patent, nor is any fact stated to excuse the absence of citation; and citation being a *jurisdictional* requirement of an appeal, it must be set forth in order to show that there was an appeal perfected, as more than five years had expired. *It seems to us impossible not to observe the contrast and conflict between these two decisions of* Castro *and* Gomez, *which lie between the covers of the same volume of this court's reported adjudications!*

In the United States *v.* Hodge (3 How.) the court said:

"This case is brought here by a writ of error to the Circuit Court of the eastern district of Louisiana, and a motion has been made to dismiss it, because the citation was signed by the clerk, and not by a justice of the Supreme Court, nor by a judge of the Circuit Court, as directed by act of Congress of 1789, (ch. 20, sec. 22.) *The defendant is not bound to appear here unless the citation is signed in the manner prescribed by law; and as that has not been done in this case, the writ must be dismissed.*"

In Villabolos *et al. v.* The United States (6 How., 90) the court said, Mr. Chief Justice Taney delivering the opinion:

"When the appeal is not made in open court, and *at the term* at which the final decree is passed, the CITATION is necessary, (The San Pedro, 2 Wheat., 142;) and, where necessary, the law requires it to be signed by the judge; *and we have no power to receive an appeal in any other mode than that provided by law.* (Lloyd *v.* Alexander, 1 Cranch, 365; Bailiff *v.* Tipping, 2 Cranch, 406; Wood *v.* Lide, 4 Cranch, 180; Pickett's Heirs *v.* Legerwood, 7 Peters, 144; Yeaton *v.* Lennox and others, 8 Peters, 123.) It follows, that where a citation is required in a case of appeal, it must, as in the writ of error, *be issued and served on the opposite party before the term* of the appellate court next after the appeal is entered. (Yeaton *v.* Lennox, 7 Peters, 220.)

"There was no such citation in the present case, *and the entry in the clerk's office, standing by itself, was not a removal of the case by appeal, according to the act of Congress.* THERE WAS, THEREFORE, NO APPEAL WITHIN THE TIME LIMITED BY LAW."

Thus, it will be seen, that Chief Justice Taney rests the necessity of the citation not merely upon the general and well-established practice of the court, *but the Chief Justice asserts that any other rule would violate the act of* 1851, *allowing appeals in these particular California cases; thus showing that the appellate jurisdiction is special and statutory, and could not be exercised without a strict compliance with the statute.*

In Bacon *et al. v.* Hart (1 Black, 38) the court, by Mr. Chief Justice Taney, said:

"In March, 1858, judgment was rendered by the court for the plaintiff. In October of the same year a writ of error was sued out, returnable the first Monday in December next thereafter, and service of the citation was, on the 9th of October, admitted, by William Hart, senior. But this writ of error was not returned during the term to which it was made returnable, and failed, therefore, to bring up the case.

"The CITATION *not being served* on the party or his counsel, *the cause is not brought into this court* agreeably to the act of 1789, and the writ, therefore, must be dismissed, *for want of jurisdiction.*"

These uniform decisions cannot be impaired by a single case, *save that of Gomez alone.* The practice results from the

provision of the constitution which confers upon this court appellate powers "*with such exceptions and under such regulations as the Congress shall make.*" Therefore it follows *that when such jurisdiction is given, it must be obtained in the mode prescribed by Congress, and can be exercised in no other way; and that parties cannot, even by consenting to waive a writ, confer jurisdiction, for that is one of the cases where consent cannot give jurisdiction.* (The County of Washington *v.* Durant, 7 Wall., 694; Barry *v.* Mercien, 5 How., 119; Durousseau *v.* The United States, 6 Cranch, 313; Marbury *v.* Madison, 1 Cr., 371; Paschal's Ann. Const., note 211, p. 207; Gleason *v.* Florida, 9 Wol., 783; Pierce *v.* Cox, 9 Wall., 787; Edmonson *v.* Bloomshire, 7 Wall., 312.)

The jurisdiction assumed and exercised by this court over the Gomez case, in the absence of a citation, or any pretence of any, is justified, in the opinion of Mr. JUSTICE CLIFFORD, on two grounds of judicial construction. (1 Wall., 701.)

1. It is construed that the order of appeal, allowed by the United States District Court on the 25th day of August, 1862, *might well be regarded as taken at the same term of that court in which the decree of June* 5, 1857, *was rendered, and that, therefore, no citation was necessary.* How these two events, which occurred and stand entered on the records of the court 5 years, 2 months, and 21 days apart, and between which had elapsed 14 to 16 terms of court, are construed to have taken place at the same term, is explained by the opinion. It appears from that opinion, and from the reporter's statement of the case accompanying it, (*ibid.*, 692,) and also from the same reporter's statement accompanying another opinion of the same learned JUSTICE in the cause, (3 Wall., 756,) and from the record, to which reference is made, that on March 21, 1861, Judge Ogier, of the United States District Court, mounted the bench of that court, *and, on his own motion,* and in the absence of the claimant or his counsel, *directed the entry of an order that the decree of June* 5, 1857, *be vacated and set aside, and that "the cause be put on the calendar, and set for trial de novo, according to law!"* As soon as the claimant heard of this performance, which ought to be held

as harmless as it was bold and reckless in its defiance of both judicial propriety and power, he at once moved, before Judge Ogier himself, for a rescission of that order. But, pending that motion, to borrow the dramatic language of the reporter, (*ibid.*, 756,) "Behold an incident! Mr. Justice Ogier died. Another judge sat in his seat, and he, thinking that, after the lapse of a year, (nearly four years!) no power rested with his deceased brother to alter or modify a decree, except to correct some clerical error, 'with great reluctance,' on the 4th of August, 1862, vacated the order of March 21, 1861, made by his predecessor." The judge who thus undid Judge Ogier's illegal act was Judge Fletcher M. Haight, of honored memory. The reporter, it will be observed, in the passage just quoted, does not fail to note that Judge Haight, then just introduced into the atmosphere of the court, made redolent with the calumnies against the claimant's cause, which had been industriously created there under the *regime* of Judge Ogier, set aside this order "with great reluctance;" but it did not seem called for by the reporter to notice that subsequently, as is abundantly and forcibly disclosed in the record, Judge Haight, on becoming better acquainted with the case, changed his views respecting it, and indorsed the validity of the claimant's title, and denounced the efforts made to obstruct its assertion in this court, and elsewhere, as fraudulent, and "*as a fraud upon the Government.*"

In order to reach the result of bringing the decree of June 5, 1857, forward, so as to give it the character of a decree rendered at the same term as that of the order of appeal of August 25, 1862, it was held, in the opinion of Mr. JUSTICE CLIFFORD, that the effect of Judge Ogier's order vacating the decree *was actually to vacate it*, though it had stood for nearly four years, embracing twelve or fourteen terms of court, as parchment when that order was made; and that by Judge Haight's order of August 4, 1862, rescinding Judge Ogier's vacating order, *the decree was restored, and became a decree as of that date and term, and not of the date and term of June* 5, 1857, when it was rendered, and consequently that an appeal allowed in open court at that term, as was the appeal

of August 25, 1862, was effectual without citation. (1 Wall., 701.) Certainly it would seem not to have been inappropriate for this great tribunal, instead of indorsing Judge Ogier's order directing a new trial four years after the rendition of the decree, by making it operative to vest an appeal in this court, which could not otherwise exist, to have taken occasion, as it had so often done before, to reassert the doctrine as to the effect of expiration of term upon judicial determinations, and to have declared, with an emphasis that could not be misunderstood, that universal rule of adjudication, that no court can reverse or disturb its own final decrees or judgments for errors of fact or law, after the term at which they were rendered. (*Ex parte* Sibbald, 3 Pet., 491; Sibbald *v.* The United States, 12 Pet., 431; Martin *v.* Hunter, 7 Wheat., 355; Rich *v.* Minnesota, &c., 21 How., 82; Washington Bridge Co. *v.* Stewart, 3 How., 413.) But the court seems to have entirely overlooked that conservative principle of the law, and so far from declaring that order a nullity, it is scarcely hypothetically admitted, in the opinion of the learned JUSTICE, that Judge Haight's order rescinding it was valid, while the amazing effect is ascribed to it of drawing the decree of June 5, 1857, which it ought to have been powerless to harm or disturb out of its place on the record, and making it a decree of August 4, 1862. It is respectfully submitted that there is error here. That Judge Ogier's order was a nullity, and ought to have been so regarded by this court, as well as by Judge Haight, and that it in no way affected or disturbed for any purpose whatever the decree of June 5, 1857. The court, however, does not dispense with the citation entirely on the ground that Judge Ogier's order resulted in making the decree of confirmation a decree of *the same term* as that in which the appeal was taken, but proceeds to say: "Granting that the appeal is from the original decree, and that the question is wholly unaffected by the subsequent orders, *still it is quite clear that no citation was necessary in this case.*" (1 Wall., 701.)

The second ground, in the opinion, upon which the citation is dispensed with, is, that "*the object of citation is*

notice" of the appeal, and that, by the claimant's immediate notification to the district attorney, of his intention to move to revoke the order allowing an appeal, on hearing that it had been granted, and his stipulation with the district attorney, that the transcript should be withheld until such motion could be made, and his participation in the argument of that motion and another motion, at the same time, for a new order of appeal, resulting in the order of appeal being revoked and vacated, and in the absolute denial of an appeal, he had sufficient notice of the appeal. (Ibid.) If it be granted that no other result followed the motion to vacate the order of appeal than that, by it, the claimant showed himself possessed of full notice of the intention to appeal, still, such notice, or any other notice, even where the appeal order is unquestionable, it is respectfully submitted, under the innumerable and uniform decisions of this court, of the character of Castro's case, and the other cases above referred to, cannot have the effect to dispense with citation; for an actual citation, signed by the judge, and duly served and returned, with proof of service, is essential to the exercise of the appellate jurisdiction of this court. But, when it is considered that the claimant's motion to revoke the order of appeal was granted, and that a new motion for an appeal was at the same time denied, and those decisions were acquiesced in by the Government, it passes all comprehension how he can be said to have had "notice" even of an appeal thus judicially declared to have no existence! It is again respectfully submitted, that there is error here, and that, in consequence of it, this court, in refusing to dismiss the appeal, has exercised a jurisdiction over this cause where none existed.

Equally fatal to the *jurisdiction* was the failure of the Government to file a transcript in this court at the term next succeeding the appeal. Without doing this, the appeal was not perfected, and the order allowing one became a nullity. (Villabolos *v.* United States, 5 How., 18; United States *v.* Curry, 6 How., 182; Steamer Virginia *v.* West, 19 How., 182; Mesa *v.* United States, 2 Black, 721.)

It is not claimed that a transcript was filed, and the cause

docketed in this court before February 29, 1864, which was in the *second* term of the court after the order of appeal of August 25, 1862, was allowed. (3 Wall., sub. 3, p. 752.) But it was held, that the statute requiring a transcript to be filed at the next term after the allowance of the appeal does not apply, *in strictissimi juris*, "where the appellant, having seasonably procured the allowance of the appeal, is prevented from obtaining the transcript, by fraud of the other party, or by the order of the court, or by the contumacy of the clerk, provided it appear that the appellant was guilty of no laches, or want of diligence in his efforts to prosecute an appeal." (Ibid., 764.)

If this qualification of the statute-requirement be correct, still the opinion of the court shows that no improper impediment was employed to prevent the Government from obtaining a transcript. By the stipulation, fairly and amicably entered into between the parties, October 6, 1862, and placed upon the minutes of the clerk, the District Attorney agreed that the transcript should be withheld until the ensuing December Term, when a motion could be heard and decided as to whether or not the order of appeal of August 25, 1862, should be declared a legal and proper order. It is, however, wholly overlooked, in the opinion of the learned justice, as previously suggested, that this stipulation demanded a faithful observance from the clerk, as well as the law representatives of the Government, until the hearing of the motion to vacate the order of appeal, and it is not creditable to the Government that those representatives repeatedly besought the clerk to furnish them with a transcript, in violation of it, before that hearing was had.

The motion was heard at the time named in the stipulation, and within two days thereafter, viz., December, 4, 1862, the court decided that the order allowing the appeal had been improperly and improvidently granted, and vacated it, inasmuch as it had been granted after the time for an appeal had expired; and the court further denied, then and there, another application for the allowance of an appeal. After this denial of an appeal, Judge Haight, and the clerk of his court,

consistently held that there was no appeal, and that the attempt, on the part of those representing the Government, to secure a transcript to be used as in the case of an appeal was a *fraud* upon the Government, and for that reason a transcript was refused. (Ibid., 764, 765.) It is submitted that this refusal was proper, and in nowise created any just cause of complaint against the clerk or Judge Haight. (See letters to Attorney General Bates, Appendix E and F.)

It is further submitted that the device disclosed in the opinion, (Ibid., 765,) by which the Attorney General obtained from the clerk "a copy of each paper in the case; and appending them together, procured them to be duly certified by the District Attorney," as the transcript that was filed, failed to vest this court with jurisdiction over the cause on appeal for the reason that the statute authorizing the District Attorney to certify to a transcript, only conferred that authority *when there was an appeal*, (12 Stats. at Large, 320;) *but in this case there was no appeal*, and the statute did not apply, and consequently this court was without jurisdiction over the cause, for the want of a properly-certified transcript, even if it had been seasonably filed. It is therefore respectfully urged, in view of all the irregularities and omissions to which attention has been called under this fifth point, that the motion to dismiss the appeal in the Gomez case, (see 1 and 3 Wall.,) for want of jurisdiction in this court to entertain an appeal, should have been granted—

1. Because there was no appeal.
2. Because there was no citation.
3. Because a transcript was not seasonably filed, and the cause docketed, as required by the statute.
4. Because the transcript that was filed was not a legal transcript, for the want of the certificate of a proper officer.

Sixth Point.

The objection, upon which the decision of the Supreme Court of California is founded, that the face of the patent shows the pendency of an appeal, and that thereby, the grant being shown not to have been finally confirmed, the Execu-

tive was without jurisdiction under the act of 1851 to issue the patent, and consequently that it is void, is not well taken; because it appears upon the face of the patent not only that the appeal proceeding referred to had been vacated and set aside, and an appeal denied, but *that there had previously been an appeal taken and disposed of in the Supreme Court of the United States, by which, after full argument and advisement, the grant was finally confirmed.* (Record, p. 14.)

This recital plainly appearing in the patent must be conclusive of the jurisdiction of the Executive to issue it, if, as is held by the Supreme Court of California in its decisions of this case, "*the patent is evidence of the series of proceedings recited in it, and a solemn record of the Government of its action and judgment in respect to the title of the claimant. As such, it imports absolute verity, and both the officers of the Government and the grantee, as well as those in privity with him, are bound by the recitals of fact contained in the patent.*" (Record, p. 30.)

The patent thus not only being a grant, but a *judicial determination or judgment*, which sets forth on its face all the facts requisite to confer jurisdiction upon the officers rendering it, *cannot be questioned in any collateral proceeding.*

If the position of the Supreme Court of California be correct as to the effect of the recitals in a patent, it cannot in any way affect the validity of the patent, whether those recitals are true or false, provided they are such as, if true, would show jurisdiction on the part of the Executive to grant it, *for the truth of those recitals cannot be inquired into collaterally.*

Peak *v.* Wood, 8 Johns. R., 54.
People *v.* Collins, 19 Wend., 61 to 64.
Mather *v.* Hood, 8 Johns. R., 36.
Briggs *v.* Supervisors, 2 Denio, 26.

And there being no tribunal provided for their review, they can never be inquired into, but must stand because written in the patent as unalterable judicial verities.

Wilcox *v.* Jackson, 13 Pet., 510, 511.
United States *v.* Jones, 8 Pet., 375, 378.

This extreme position as to the effect of the recitals as evidence of the matter recited, is not here contended for or indorsed by the counsel for the plaintiff in error, but *it is claimed*, that if importance is given to *any* recital in the patent, for the purpose of raising inquiry as to the jurisdiction of the Executive to grant it, the recital that this grant *had been finally confirmed by this court on the actual trial of an appeal*, is conclusive of the fact of such final confirmation, and disposes of the objection that there was not a final confirmation in consequence of the pendency of a subsequent appeal, *inasmuch as the recital shows that this subsequent* appeal was set aside by the District Court; and the fact that a former appeal had been fully tried and determined in this court affords a good and imperative reason for setting it aside.

Seventh Point.

The action of the Executive in issuing the patent in question "*is conclusive of the legal title in all courts, and in all forms of judicial proceedings, where, as in the present form of action, the legal title must control, and no inquiry can be permitted into the circumstances under which it was obtained.*"

Johnson *v.* Towsley, 13 Wall., 83, 84.

French v Dyarr 4 otto. 169.

This is especially so where, as in this case, "no private right" is invaded, inasmuch as the defendant in error sets up neither a legal or equitable claim to the premises. (Ib.)

The issuing of a patent is a judicial act. No act confided to the exercise of executive authority can be more so. In the language of this court, "there are no functions within the range of the executive authority *less ministerial* in their character than those which are devolved upon the officers of the Land Department in the administration of matters relating to the disposal of the public domain."

Commissioner of Patents *v.* Whiteley, 4 Wall., 522.

United States *v.* Commissioner Land Office, 5 Wall., 563.

Gaines *v.* Thompson, 7 Wall., 352.

McGarrahan *v.* Secretary, 9 Wall.

French v Dyarr supra.
Opinions Mr Justice Miller. Electoral Count 1877. p.p. 1011-13.

This patent, then, stands as the result of a judicial determination, and is a *judgment* as well as a grant, and, there being no tribunal authorized to review it, it is conclusive here and everywhere, provided it has been issued in the exercise of jurisdiction.

Ib., *supra.*
United States *v.* Jones, 8 Pet., 375, 378.
Wilcox *v.* Jackson, 13 Pet., 510, 511.

But it is claimed that the patent was not issued in the exercise of jurisdiction, but that it was issued without jurisdiction, inasmuch as the Secretary of the Interior assumed the right to decide, and did decide upon the sufficiency of the certificate of the final confirmation of the grant, and wrongly adjudged that the certificate presented was an "authentic certificate" of such confirmation. Such a decision being, as is claimed by the Supreme Court of California in this case, "an opinion of the executive officers in respect to matters of law, * * and, from the nature of the powers and duties of such officers, cannot be conclusive." This is the old absurd objection to be met with all through the books, viz: There is jurisdiction if the decision is right, and no jurisdiction if the decision is wrong.

Supervisors, &c., *v.* Briggs, 2 Denio, 34.

The test of jurisdiction in all cases where the law has confided to a special tribunal, bureau, department, or branch of Government, the authority to hear and determine matters arising in the course of its duties, is, whether that tribunal acts *within the scope of its authority.* If it does so act, it acts in the exercise of jurisdiction, and its decisions are conclusive. The duty of issuing patents for such of the public land as is subject to alienation is confided to the administration of the General Land Office, whose principal officers are the President, the Secretary of the Interior, and the Commissioner; and when a patent for such of the public land as is patentable is issued in the course of administration, under their authority, it is, in the words of Mr. Justice Mil-

LER, above quoted, "a conclusive legal title in all courts and all forms of judicial proceedings where the legal title must control, and no inquiry can be permitted into the circumstances under which it was obtained." (Johnson *v.* Towsley, *supra.*)

The matter of granting the patent in this case arose in the General Land Office in due course of administration on a case regularly presented under the act of 1851 for the settlement of these Mexican titles in California.

By that act, it was provided that "a patent shall issue to the claimant of a title *finally confirmed*, upon his presenting to the Commissioner of the General Land Office an *an authentic certificate of such confirmation*, and a plat or survey of the land, duly certified by the Surveyor General of California. (18th sec. act 1851, 9 Stats., 53.)

It was, therefore, within the scope of the authority of the Land Office to issue the patent, upon an "authentic certificate of such confirmation" being presented. The act does not prescribe the requisites of an "authentic certificate." It does not say what it shall contain, or from whom it shall emanate, or by whom it shall be attested; but it is confided to the judgment of the Land Office, in its administration of the law, to determine what shall constitute such an authentic certificate.

The whole objection, as stated by those who make it, to the jurisdiction of the Land Office to issue this patent, relates, therefore, to the alleged insufficiency and incompetency as evidence of the document, record, paper, or transcript, or other proof, which was accepted and acted upon by the Secretary of the Interior, as and for "an authentic certificate of such confirmation." It is an objection mistakenly urged against the jurisdiction of the Land Office, but only amounts to a criticism upon the sufficiency of the evidence upon which the Secretary acted.

The certificate that was presented and filed in the General Land Office, as appears by the recitals of the patent, was a "duly authenticated transcript," showing, *in addition to the*

affirmance of the decree of confirmation noticed in the preceding point—

1. The origin of the claim, as derived from the Mexican authorities, and its presentation to the Board of Land Commissioners, under the act of 1851, and its rejection by that board.

2. Its confirmation by the United States District Court for the Southern District of California, June 5, 1857, on appeal from the Board of Land Commissioners.

3. That an order, made in the District Court by Judge Ogier, March 21, 1861, rescinding the decree of confirmation of June 5, 1857, and directing a new trial, was vacated and set aside August 4, 1862.

4. That an order allowing an appeal to the United States, granted August 25, 1862, was vacated and set aside in the District Court December 4, 1862, and another application for an appeal at the same time denied.

Whatever may be said of the absolute conclusiveness of such a record, it cannot be denied that it was upon its face an authentic certificate of the final confirmation of the grant.

The order of December 4, 1862, setting aside the preceding order of appeal and absolutely denying an appeal, was, at least, *prima facie* evidence that there was no appeal. As long as that order remained unrevoked, it was entitled, as has been held by this court in the similar case, *ex parte* Roberts, *supra*, to undoubted respect as a judicial determination. When, therefore, it was presented to the Land Office to be judged of as evidence, it was the duty of the officers of that tribunal to give it full faith and credit for all it purported to be and do. It came before the Land Office not as an order, but as evidence pure and simple. If, as evidence, it seemed to the Secretary, when the question came before him on appeal from the Commissioner, to be an authentic certificate of final confirmation or an equivalent for it, it was his duty to receive it and act upon it as such. If it was any evidence at all in the nature of an authentic certificate of final confirmation, it is sufficient to sustain his decision and to uphold his jurisdiction to decide

in the matter. The test of jurisdiction in all such cases is, was there any evidence at all of the character required? If there was, it matters not how slight or inconclusive it was, it was effectual to uphold or confer the jurisdiction exercised by the Secretary over the case.

There was not only the authority of the order of the court to advise the Secretary that there was no appeal, but the record disclosed that the time to appeal had already expired before an appeal had been applied for. The Secretary could compute when five years from June 5, 1857 would expire, that being the date shown by the "authenticated transcript," from which the time of appeal was to be computed, and that it had expired prior to August 25, 1862, and that consequently no order of appeal allowed on that date was valid; that the one granted ought to have been set aside, as it was. *It was the duty of the Secretary to disregard an appeal taken out of time, even if it had not been set aside.* He could even try the question as to whether or not an order of appeal had in fact been allowed at all. He could inquire into the integrity of the record of the cause, and ascertain if it spoke the truth on that question, as this court had done in this very controversy, when it tried, on *ex parte, aliunde* evidence, the question as to whether or not the appeal of March 15, 1858, had been allowed. (U. S. v. Gomez, 23 How., 326.)

The law under which the Secretary acted, imposed upon him the duty of giving to such proofs as came before him, the due legal effect which he supposed them to possess, and deciding accordingly. This done, his decision was conclusive, as he was the tribunal of last resort.

He may not have decided upon the proofs, as this court would have done; he may have decided in flagrant disregard of the precedents of this court; he may have illustrated all the infirmity of human fallability in his decision; but if there had been presented by the claimant, to the Commissioner of the Land Office, a document, paper or record, which in the judgment of the Secretary, when the question came before him on appeal from the Commissioner, was an "authentic certificate" of final confirmation, it was his duty to direct the issue

of the patent, if no other consideration forbade, and the patent so issued would be valid, however defective or unsatisfactory to this court, or any other tribunal, that certificate might be.

The consequence of this power of the officers of the land office "to hear and determine" as to the authenticity or sufficiency of this certificate, gives a wide limit and potency to the decision of those officers. It of course involves the right to reject a legally complete certificate, or to accept a defective and insufficient one, or to treat both as merely *prima facie* evidence, and inquire behind them and decide as to the truth of the matter they profess to verify. (Le Roy *v.* Jamison and others, C. C. of U. S., Dist. Cal.)

Mr. Justice FIELD, in illustrating the conclusiveness of the decisions of the officer of the Land Office on the questions affecting the legality of a patent, *when the certificates of survey and final confirmation are presented*, as the basis for the claim to a patent, says, in this case of LeRoy *v.* Jamieson: "These certificates were *prima facie* evidence, and before the patent issued the commissioner was at liberty to go behind them and inquire whether notices had been, in fact, published as there stated. * * * But, aside from all considerations of this kind, the case cannot be disposed of by any judgment we may form of the evidence which controlled Commissioner Wilson. We have commented on that evidence, because upon its supposed insufficiency Commissioner Drummond justified his attempted annulment of the action of his predecessor and the cancellation of the second patent. * * * As we have already stated, it was the duty of the commissioner, upon receiving a survey, transmitted to him, as published in the act of 1860, to examine into the regularity and *sufficiency* of the alleged publication. *That was a matter submitted by the law to his determination, and that determination, whether correctly or erroneously made, was conclusive, unless reviewed and corrected, on appeal, by his superior, the Secretary of the Interior; * * * and it would be without precedent, against principle, for a court of law, in an action of ejectment upon the patent, to inquire collaterally into the sufficiency of such evidence to justify the action of the commissioner.*"

In that case, the contest was upon the *sufficiency* of the certificate of the *survey*, while in our case the objections is upon the *sufficiency* of the certificate of *confirmation*; but it is obvious that the principle of MR. JUSTICE FIELD'S decision is equally applicable to both certificates, nor can it shaken or evaded, because, in deciding as to some ultimate fact, the Commissioner had to decide some question of law. It was as much his province to decide a question of law, if it arose in the case before him, either upon the admission of evidence, or its effect, or the construction of a statute, as upon the existence of a fact, deemed to be established by the proofs. There is no ground, therefore, for the suggestion of the Supreme Court of California that, when the officers of the Land Office decided questions of law arising in a case before them, the dedision was not as conclusive as would have been their decision on a question of fact. In the very nature of the case they had to decide on all the questions, whether of law or fact, involved in each particular case. The proceeding required an examination into and a determination of the question as to whether there had been a final confirmation of the claim, *and that is what was done and decided in this case.* The matter was presented to the General Land Office on what is described in the patent itself as "a duly certified transcript," and "a duly authenticated transcript," showing that an appeal to the Supreme Court from the decree of confirmation had been denied by the District Court. (See Recital in Patent Rec., p. 15.) This showed a final confirmation of the grant.

That presented the case—brought it into court, and was the *jurisdictional* basis of a judicial inquiry that resulted in the refusal of the Commissioner of the Land Office to approve the issue of the patent. From this decision an appeal was taken in regular course of proceedings, as provided by law, to the Secretary of the Interior. What evidence was presented to him or to the Commissioner in addition to the "duly certified transcript" does not appear from the recitals of the patent; but the written decision of Secretary Smith shows that there was a contest before him, made by a party who had been victorious before the commissioner; that charges of fraud were made and

met, and that the matters controverted embraced a wide range of topics, *and included all the suggestions of fraud in the grant and the manner of procuring its confirmation.* His decision, filed December 29, 1862, concluded as follows: "My conclusion is that the decree of the District Court for the southern district of California, confirming the grant, has become final. The United States has no longer any interest in the controversy; no claim of third parties has been interposed. *The suggestions of fraud in the grant, or in the manner of procuring its confirmation,* are *res adjudicata.* And I am unable to discover any reason why a patent should not issue in conformity with the decree of the court and the survey. You will, therefore, issue a patent for the land in accordance with the survey as reported by the Surveyor General." (Record, p. 10, 2d Further Finding.)

This decision was subsequently reviewed and reaffirmed by Secretary Smith's successor, Secretary Usher, March 4, 1863. (Record, p. 10, 3d Further Finding.)

The Judiciary Committee of the House of Representatives of the Fortieth Congress, in their report adopted by that House, (see appendix C of this brief, p. 6,) in alluding to these decisions of Secretaries Smith and Usher, say:

"2. Here, again, he (the claimant, McGarrahan,) was confronted by the New Idria Mining Company, before referred to. The Secretary of the Interior at that time, (Hon Caleb B. Smith,) after argument in the case, ordered the patent to issue.

"Thus, again, for the third time, the title to the Panoche Grandé was found to be in Mr. McGarrahan. Some unknown cause delayed the execution of this order, and the patent was not issued. This neglect, or refusal, was persisted in throughout the remainder of Mr. Secretary Smith's term. The matter was then brought to the notice of Mr. Usher, the new secretary, before whom it was again argued, and by whom a patent was directed to be issued. Neither the order of Mr. Smith, nor Mr. Usher was obeyed, for some reason not yet divulged or ascertained.

"For the fourth time, the title of Gomez and his grantee was decided to be good and available in law. A request was then made by the claimant of President Lincoln that he would

make an examination of the case, and determine upon its merits. This he consented to do. Printed briefs were laid before him; and, upon full consideration of all the facts and circumstances, he directed the Secretary of the Interior to cause a patent to issue to Mr. McGarrahan. And thus, for the fifth time, Mr. McGarrahan was declared to be entitled to the property or rancho, and that neither the United States nor any other person had lawful claim to the same.

In accordance with this order of the President of the United States to the Secretary of the Interior, a patent was actually made out; but for reasons not fully explained, never delivered to him for signature.

To recapitulate:

1. The proof of a legal grant from the Mexican Government to Gomez and the transfer of title to McGarrahan are clearly and indisputably shown.

2. The district court of the United States for the southern district of California confirmed the grant.

3. The Attorney General of the United States declared the title to the lands to be in Mr. McGarrahan, and caused an entry to that effect to be made on the books of his office and in the Supreme Court.

4. Hon. Caleb B. Smith, Secretary of the Interior, after examination and consideration of the case, ordered a patent to be issued to Mr. McGar.ahan.

5. Mr. Usher, the successor in office of Mr. Smith, similarly decided.

6. Mr. Lincoln after inquiry, decided the grant to be genuine, and that a patent should be issued to Mr. McGarrahan.

From the time when the district court pronounced its decree of confirmation, (June 5, 1857,) and the President's action in the case, (in the fall of 1863,) it will be observed, over six years had elapsed, and, in consequence of the lapse of time, an appeal could not be had according to law, unless something should appear to avoid the limitation.

In December, 1863, a paper, purporting to be a transcript of proceedings as they appeared on the records of the district court, was prepared in the Attorney General's office in Washington, District of Columbia, forwarded to the district attorney in California, certified by him out of his district, without comparison with the record, and merely from memory, and from which transcript were omitted material parts of the record, and returned to Washington.

Upon the transcript thus made up, the case was again brought before the Supreme Court, which being discovered

by the claimant, a motion was made to strike off the appeal, which was refused, although it, as it seems to the committee, was out of time, and the transcript had been made up without reference to the actual records of the district court.

Notwithstanding, the Supreme Court refused to strike off the appeal taken in the manner indicated, a new transcript was obtained, 1865, from the clerk of the district court, and filed at December term, 1865, eight years and a half after the decree of the district court confirming the title was first pronounced, and more than three years after the period had elapsed within which the law allowed an appeal to be taken in the case, unless some exception takes it out of the limitation. Upon this appeal the Supreme Court, in March, 1866, decided the case against the claimant, and thus matters now stand.

The committee have bestowed a great deal of time and labor upon this case, in order to arrive at its real facts and merits. The claimant and the parties resisting his claim have been heard patiently and at great length."

It has been discovered by the claimant, since the report of the Judiciary Committee, that the patent was made out and duly executed. That discovery was made in July, 1870. The patent was issued March 14, 1863, in accordance with the decisions of Secretaries Smith and Usher and President Lincoln. Those decisions embraced an examination of all the questions that had arisen or could arise in the case. The adversaries of the claimant had all the benefit of the decision of this court on the recall of the mandate, reported in 23 Howard, as to the manner of procuring the confirmation of the grant. The charges there made out on *ex parte* affidavits were repudiated on fuller proof. All the questions of practice that had arisen or could arise in the case relating to further judicial proceedings were discussed. A pertinent and necessary inquiry before the Secretaries and the President was, whether there was an appeal in the case; whether an appeal had been denied, and, if properly denied, whether the time to take an appeal had not expired before an appeal was applied for; whether any alleged appeal had been properly set aside or had been prosecuted according to law; whether citation had issued or transcript had been filed; in short, whether, in the then

predicament of the case, it was subject to the jurisdiction of this court on any appeal that had been or might be attempted.

At that time no appeal had been docketed in this court, nor was any transcript purporting to be filed, as in the case of an appeal, lodged here until February 29, 1864, nearly a year after the patent was issued. Without commenting upon the anomaly of the executive, as represented by his agents in the Attorney-General's office prosecuting an appeal in this court *after he had*, (speaking with his own proper voice, and approving with his own hand,) decided judicially in affirmance of the judgment of the Secretary of the Interior, that there was no appeal, and that the right of appeal had expired, and that the Government had abandoned the controversy, let us inquire, was not the decision of Secretaries Smith and Usher, and the issuance of the patent in conformity therewith, conclusive on all the questions decided or necessarily involved therein? And if the patent had not been withheld and the fact of its issuance concealed from the claimant, would he not have been entitled to a dismissal of the appeal brought into this court subsequently by the transcript filed here February 29, 1864, on exhibiting his patent to the court? For the controversy stood then analogously to that of a judgment debtor who has taken an appeal, and pending the same voluntarily and unconditionally, settles in full; after that no court would permit him to proceed with the prosecution of his appeal, if the facts were presented by his paid creditor on a motion to dismiss it.

It is submitted that the patent embodies a technical and final judgment of a tribunal of competent jurisdiction on all the questions involved in this controversy, and that such judgment was and is *res adjudicata*, and a bar to the proceedings subsequently taken in this court, (see United States *v.* Gomez, 1 and 3 Wall.;) and that, as directed by the House of Representatives of the 41st Congress, *the question of the validity of this patent ought to be decided irrespective of those proceedings.* (See Appendix D, this brief.)

as a technical judgment for title.

We think this proposition, as to the conclusiveness of the patent, results obviously from the *exclusive* duties and powers of the Land Office, as a *political* function of the Government over the disposal of the public domain. Mr. Justice Miller upheld it with conspicuous emphasis in his opinion before the commission for the count of the electoral votes of 1877, in deciding the Florida case. He said:

"Jurisdiction is the power to examine and decide, to hear and determine, the subject-matter submitted to the tribunal, by which the jurisdiction is to be exercised. Where jurisdiction is given over the whole subject, as in this case, to decide who are elected, it cannot be limited to that which is directory in the mode of proceeding. It may not follow that mode, yet its decision be valid. Its decision may be erroneous, but it is, nevertheless, the decision of the only tribunal having jurisdiction, and it must be conclusive. *I say it must be conclusive because there is no other tribunal which is by law authorized to review this decision or to correct its errors, if any exist.*

"In all governments where rights are secured by law, it has been found necessary when those rights, whether public or private, *depend upon the existence of certain facts*, to appoint an officer, a commission, a tribunal, by whatever name it may be called, *to ascertain these facts and declare the rights which they give*. This is a necessity of civil society, and on it courts of justice are founded. It is also a principle necessary to the existence of law and order, and to the security of these rights, that the decision of this tribunal should be respected, whether those rights be public or private; and except when there is a provision in the law for an appeal from such decision, or review of it in some recognized legal mode, it *must* be conclusive. As regards courts of justice, this principle is everywhere recognized, and is acted on every day. There is no reason why it should not be equally applicable to all other tribunals acting within the scope of their authority, and it is so. As illustrations, I will cite a few instances from the highest judicial authority in this country, with whose decisions I am familiar. We have had in that court a vast number of suits founded on bonds issued by counties, cities, towns, and townships, in which the defense was that the bonds were is-

port of a majority of the popular vote, or the ancient government which was resisting overthrow by the Dorr movement, this Court shuts it eyes resolutely to any inquiry into the facts on which either government claimed to be the right one, and said that the Constitution of the United States had confided to the political department of the Government the right to determine the question, and that though the private rights before the Court were judicial in character, the Court was bound by the action of President Tyler, who in issuing a proclamation requiring the supporters of the so called Dorr government to disperse, had treated them as insurgents, and had recognized the ancient government as the true one. Behind this action the Court could not inquire, but must accept it as decisive of the question.

"In the latter case, in this, in the process of constructing the State of West Virginia out of certain counties of the Commonwealth of Virginia, it has been determined to refer the question of which State should include the counties of Berkeley and Jefferson to the popular vote of these counties. By a statute of the Commonwealth, the Governor of that State was authorized to call such an election by proclamation to ascertain the results, and if carried to certify the same to the Governor of West Virginia, whereupon these counties became part of the new State. All this was done. But a few years after the Commonwealth filed her bill in chancery in the Supreme Court of the United States against West Virginia, claiming to recover back jurisdiction of those counties, upon the grounds, among others, that no fair vote had been taken; that the majority was the other way; and that the Governor was imposed upon by false and fraudulent returns. The case was heard upon demurrer, and on this subject the court said:

"We are of opinion that the action of the Governor is conclusive of the vote, as between the States of Virginia and West Virginia. He was, in legal effect, the State of Virginia in this matter. In addition to his position, as executive head of the State, the legislature had delegated to him all of its own power in the premises. It vested him with large control, as to the time of taking the vote, and it made his *opinion* of the result the condition of final action."

But even if the patent was erroneously or improperly granted, so that the United States, in a direct proceeding for that purpose, could procure it to be vacated or annulled, it could not be attacked collaterally, particularly by a third party, who, as in this case, shows no title of his own. Nor could it be so attacked by the United States. A patent is a record, and imports absolute verity. Until it is vacated by a direct proceeding, instituted by the Government for that purpose, it is conclusive.

Leese *v.* Clark, 18 Cal., 535, 536, 572.
Mora *v.* Foster, 3 Sawyer, 469.
Johnson *v.* Towsley, 13 Wall., *supra*.
LeRoy *v.* Jameson, *supra*, opinion Mr. Justice Field.
Also, Leroy *v.* Clayton, U. S. C. C., Ninth Cir. Dist. Cal., opinion by Judge Sawyer, Jan. 22, 1874.

The patent in this case recites all of the facts (*irrespective of the recital that the grant had been confirmed on appeal to this court*) requisite to give the authority and make it the duty of the Government to issue the patent. Those recitals are evidence of the facts, and are conceded to be so by the court below, as appears from its opinion. How, then, with those facts thus established, and being incontrovertible, the court could disregard them, and hold the patent void, passes comprehension. With the same propriety, a judgment, or record of a judgment, of this court, fair and regular on its face, and properly proved, might have been disregarded.

The act of the President in granting the patent is a judicial act, and there is nothing on the face of the patent showing that he had no jurisdiction.

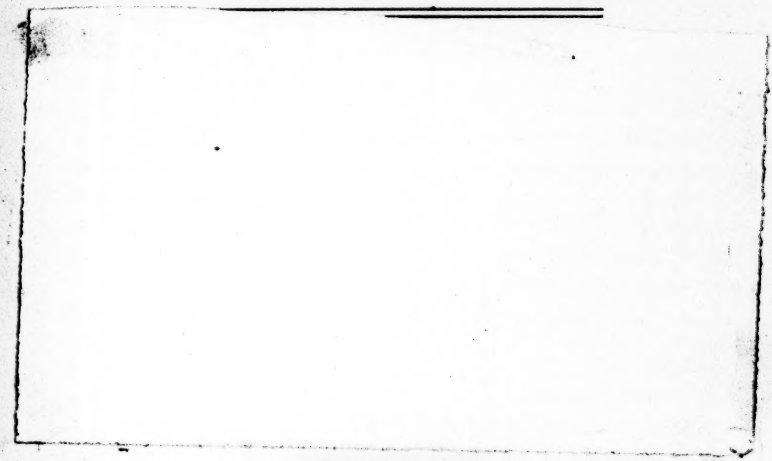
The cases in which patents may be and have been held void are cases where the patents on their face show that the officer or officers granting or issuing it have not jurisdiction of the subject-matter, *e. g.*, where the patent is for land not authorized by Congress to be granted.

Such patents unquestionably would be void everywhere.

A judgment of a court thus showing on its face a want of jurisdiction would be held void in any proceeding.

But this is not such a case. The patent in this case was one that the President not only had the right to issue, but which it was his duty to issue on the occurrence of the facts which are recited in that patent, and which were thus shown to exist by evidence that not only was not but could not be disputed.

The court, then, in holding that title or patent to be void, decided directly contrary to law and the evidence, and its judgment should be reversed.



Eighth Point.

Though the Supreme Court of California concedes that the record of the patent exhibited in the case, may be regarded "*as constituting the original patent*," it is claimed by the defendant in error that it is invalid—

First. Because the name of the officer whose duty it was to countersign patents is absent from it;

Second. Because the defacements and written statements that were drawn and entered on its face by Commissioner

Wilson and Recorder Granger over seven years after the record was made, have canceled and destroyed it.

These objections, and all others that are made to this record in the form it is presented in this case, as a complete and sufficient record for every purpose of a perfectly executed original patent, are so fully discussed in the brief of the counsel of the plaintiff in error, in the Supreme Court of California, which has been filed on this appeal, as a part of the argument of our senior counsel, Mr. Blair, that little can be added to his conclusive and exhaustive presentation of the authorities which he has arranged and cited in *extenso* under the following propositions:

Page.

I. The patent is conclusive, herein: *An appeal pending on the part of the United States, would not operate as a supersedeas, or prevent the United States, through its officers, from making the survey or issuing the Patent*..... 1

II. The record of the patent is evidence as high, if not higher than the patent itself, and, with the conveyance from the patentee, is conclusive of appellant's right to recover 15

Statutes of the United States affecting the subject..... 15

III. The record kept by the Governmont is the original. The patent is the evidence of what exists in that original..... 23

IV. The recording of a document which the law authorizes to be recorded, is evidence of the pre-existence of all that is necessary to authorize the recording.. 37

V. Pencil marks in writing does not constitute any part of record..... 39

VI. The attempted mutilation of the record is unauthorized, and of no effect..... 41

VII. No officer shall impeach his own record.. 48

VIII. He cannot correct, or amend, or reverse the acts of his predecessor..... 51

Page.

IX. The certificate of Commissioner Wilson and Recorder Granger, in red ink, across the face of the record, is no proof of the matter therein stated..... 55

X. A patent can only be amended or canceled by *scire facias*, or bill of equity..... 67

XI. His certificate to the copy of record is evidence only so far as it certifies the record 74

XII. If the officer certifying a copy of a public record inserts something more which he is not authorized to certify, this is surplusage, forms no part of the document, and is not in evidence..... 77

XIII. It is the affixing of the seal which passes the title.. 79

XIV. The patent takes effect from its date, and needs no delivery..... 81

XV. The fact that the record of the patent does not contain "the name of the person countersigning the same" does not affect its validity..... 83

The main objection urged against the record, as the record of a patent legally complete in every respect, is based upon the absence of the name of the recorder, as a countersigning officer. That objection is fully met and answered in the brief above referred to; but we submit the following additional authorities, in connection with a reference to *some* of the statutes, *all of which are fully set out under the second propositivn of that brief:*

By the United States Revised Statutes, 76, sec. 458, "all patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President and countersigned by the Recorder of the General Land Office, and shall be recorded in the office in books kept for that purpose."

A prior section (450) authorizes a secretary to sign the President's name.

In this case the patent is signed by the President by W. O. Stoddard, Secretary, and sealed with the proper seal.

But the countersignature of the recorder is not there, unless

it is that of the secretary, Stoddard, who, from the punctuation in the record, appears to have signed as acting Recorder.

But whether it is countersigned by the Recorder, or acting Recorder, or not, cannot affect the validity of the patent. There is only an attesting signature. It is the signature of the President that makes the patent. It is, as stated at the conclusion of the patent: "In testimony whereof, I, Abraham Lincoln, *President of the United States, have caused these letters to be made patent*, and the seal of the General Land Office thereunto affixed. Given under my hand," &c.

The Recorder is but the clerk of the President. He may witness the execution, but his signature does not make, or purport to make, the patent.

The statute requiring him to sign it is merely *directory*, and he could, without doubt, be compelled to *countersign* it, but his omission, neglect, or refusal would not make the patent no patent. The very use of the word countersign would show that. Countersigning is signing an instrument after it has been signed—attaching the signature of a *subordinate officer* to authenticate it, or as a witness to it, after it has been signed by the principal or party.

Such a statute, or a statute requiring such an act to be done, *and containing no negative words, and omitting to prescribe the consequences of a violation of its directions*, (as is the case here,) is directory merely.

Sedgwick on Statutory and Constitutional Law, 368, 369, 370, 371, 373, 374.

Rex *v.* Inhabitants of Birmingham, 8 Barn. and Cress., 29, 35.

Cole *v.* Green, 6 Manning and Granger, 872, 890.

Gate *v.* Mead, 2 Denio., 160.

Marchant *v.* Langworthy, 2 Denio., 526.

Juliand *v.* Rathbone, 39 Barb., 101.

By the act of 1812, a subordinate officer in the Treasury Department, called a commissioner, was required among other things to affix his seal, or the seal of the department, to documents, (Brightly's Digest, 462; Secs. 1, 3, 4,) and in

all matters relating to public lands, he was was to act under the direction of the President of the United States. (Id., Sec. 8.)

All land patents were to be issued in the *name* of the *United States*, and under the seal of the said office, and be signed by the President, and countersigned by the commissioner, and recorded in the said office, in books to be kept for the purpose." (Id., 465, Sec. 28.)

By section 7 of an act, passed in 1836, it was made the duty of said commissioner to prepare and certify copies of records, in his office, when required. (Id., 463, Sec., 9.)

And afterwards, by an act passed in 1841, the duty of countersigning patents was imposed upon the recorder. (Id., 465, Sec., 31.)

Then, in 1843, it was further provided, that copies of any such records, "which have been or may be granted," by virtue *of said seventh section of the act of* 1836, "shall be deemed and held to be of the same validity" * * * *as if the names of the officers, signing and countersigning the same, had been fully inserted in such record.*" (Id., 464, Sec. 26; United States Revised Statutes, Secs. 891, 2469, 2470.

It is thus declared by the statutes that the patent is to be issued in the name of the United States, and signed by the President, and sealed with the seal of the department, all of which was done.

The Recorder, in addition to putting on the seal, was simply to countersign or witness it. He is not the granting party. He does not execute it, but it is simply his duty after it shall have been executed to certify or witness it. The important act for him to do is to affix the seal, and that was done. That authenticates the document and puts it in a condition to prove itself. The act of countersigning was a mere ministerial act which it was the duty of the officer to perform, the neglect of which cannot, within well-settled rules, be allowed to prejudice a party.

That it was a mere inadvertence or careless omission is shown by the fact that the same Recorder recorded it, which

he would not have done if he had supposed anything had been omitted which the law required.

Independent, therefore, of the act of 1843, the neglect of the Recorder to add his signature to the patent would not invalidate it, but as if to remove all doubt and to prevent the raising of such an unmeritorious objection, it was provided by that act that a patent granted and recorded should be held valid notwithstanding the neglect or omission to affix such a signature.

The act is a just one and exactly meets this case, and the extraordinary conduct of some of the officers in various proceedings to defeat or destroy this patent or the title of this plaintiff show the propriety and necessity of a statute for such purposes.

Yet, clearly as this appears, and notwithstanding the Supreme Court of California did not decide that the patent was invalid because of the omission of the Recorder to countersign it, nor place its decision on any such ground, the defendants' counsel, driven to the necessity of seizing on anything by which they can hope to raise a doubt in the mind of the court, now argue that the act of 1843 was a "curative" act, intended only to cure past defects.

"*Curative* indeed! It is a singular use of words ("*which have been or may be granted*") to apply *only* to past transactions. Argument is unnecessary in such a case. That position has no merit by which they seek to deprive a man of his title and his property, because of carelessness or omission of a subordinate officer to do a mere ministerial act, *which it was his duty to do*, and falls to the ground.

Ninth Point.

The plaintiff in error is not only entitled to have the judgment of the Supreme Court of California reversed, but he is entitled to have judgment absolute in this court, or rather a judgment remanding the case to the court below, with directions to enter a judgment in accordance with the prayer of the complaint.

It is within the power of this court to give such a judgment, inasmuch as the Supreme Court of California could have directed the entry of such a judgment by the District Court, and it should have done so on the proofs and special findings.

Leese *v.* Clark, 20 Cal., 426.
McDermott *v.* Higby, 33 Cal., 489.
Hedden *v.* Jordan, 28 Cal., 304–6.
Argenti *v.* The City of San Francisco, 30 Cal., 458.
Galean *v.* Neville, 2 Cal., 81.
Love *v.* Shartzer, 31 Cal., 487.

All of which is respectfully submitted.

CH. P. SHAW,
HENRY W. CLARK,
Of Counsel for Plaintiff in Error.

APPENDIX.

Appendix A.

DECISION OF JUDGE FLETCHER M. HAIGHT, ON VACATING THE ORDER OF APPEAL ALLOWED AUGUST 25, 1862, AND DENYING AN APPEAL IN THE GOMEZ CASE.

In the District Court for the Southern District of California, Los Angeles term 1862.

THE UNITED STATES VS. VICENTE GOMEZ.

1. Appeal must be brought within five years from the determination of the cause by the Court, and judgment entered in the minutes.

2. It is competent for a court to make an order for the entry of a decree or judgment, *nunc pro tunc*, and when made, the decree relates back to the time of the decision, and the right to appeal runs from that time.

In this case a decree of confirmation was ordered the 5th day of June, 1857. The decision was then made and entered in the minutes, and the minutes signed by the judge, as usual. On the 21st day of March, 1861, my predecessor, Judge Ogier, made an order vacating the decree entered the 5th day of June, 1857, of his own motion, as the order in the case states. After the term at which the decree was made, a notice of motion to vacate the decree seems to have been given; but the order made recites that the Court had been imposed upon by reason of the consent of the District Attorney, who was a party in interest; and on his motion vacated the decree. A motion was made to vacate this order setting aside the decree, mainly on the ground that the Court had no jurisdiction to alter or change, or reverse or modfy its own decree, except to correct some clerical error, after the term had elapsed at which the decree was rendered. For the particular reasons which induced the order of my predecessor, see 23 *Howard's Reports*, 326.

Upon that motion, which was continued for several terms and finally heard at the June term, 1862, at Monterey, I held

that all jurisdiction over the decree ended with the term at which it was rendered, and no circumstances could confer any jurisdiction on the Court to vacate a decree after the term at which it was rendered. The decree in the case was not drawn up and finally signed and entered until the 5th day of February, 1858. The decree finally signed, after the usual decree of confirmation, has this clause added: "And it also appearing to this Court that heretofore, to wit, on the 5th day of June, 1857, at a regular term of this Court, holden in the town of Monterey, State of California, the claim of the appellant in this case had been confirmed by this Court, but that it had been omitted by the Court to sign the decree of confirmation at the time the decree was made, it is therefore further ordered by this Court that the same be signed now as for then." In other words, the *nunc pro tunc* clause was added to the decree.

The order vacating the order of Judge Ogier was made the 4th day of August, 1862. Some short time after this order, an *ex parte* application was made for leave to appeal from the final decree heretofore made at June term, 1857, and formally signed and entered the 5th day of February, 1858. An appeal was granted, as a matter of course, upon application of the District Attorney and without any reference to the particular state of the case, as has been the usual practice in this District. Shortly afterwards a stipulation was filed, signed by the District Attorney, that a transcript be withheld, and all proceedings stayed, to give the claimant an opportunity to make a motion to vacate the order granting an appeal. This motion came on to be heard, by consent of the respective parties, at the present term, at Los Angeles, and involved three questions—only one of which, however, was debated by the respective counsels.

1. An appeal having been allowed, but the record still remaining in this Court, whether the Court could vacate the order allowing the appeal from the final decree, no objection being made to the jurisdiction, and the question coming up as on an application for the allowance of an appeal, I held that the motion could be entertained.

2. There are five years for an appeal, and the next question is, when do the five years begin to run?—from the time the judgment is pronounced and decree entered in the minutes, or from the time it is formally drawn up and signed and entered in the register of decrees?

In the Judiciary act of 1789, (*Statutes at Large*, vol. 1, 84,) it is enacted—"And writs of error shall not be brought but

within five years after rendering or passing the judgment or decree complained of," etc.

By the act of 1803, (*Statutes at Large*, vol. 2, 244,) it is enacted—"And from all final judgments or decrees rendered or to be rendered in any Circuit Court or in any District Court acting as a Circuit Court in any cases of equity," etc. When the matter or sum in dispute shall exceed the sum of $2,000," etc. "And such appeals shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error," etc. This section adopts the rules, regulations, and restrictions contained in the act of 1789, with respect to the time within which a writ of error may be brought, etc. (See *Brightly's Digest*, 261, and cases there cited.)

In the case of the United States *v.* Pacheco, (20 How. Rep., 261,) it was held, that as the act of Congress passed on the 3d March, 1851, does not specify the time within which an appeal must be made to the Supreme Court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeals. An appeal, therefore, must be taken within five years from the final decree. The first inquiry, therefore, is, when does the time begin to run?—from the time the decision is pronounced and entered in the minutes, or not until the decree is formally drawn up, and signed and entered? My first impressions were, that, until that decree was actually entered, the time for appealing did not begin to run; but, upon examination, I find the highest authorities totally different. It will be remembered that the acts of 1789 and 1803 place suits of error and appeals on the same ground. In the case of Fleet *v.* Young, (11 Wend. Rep., 522,) the court of errors in New York held that the time for suing out the writ of error commences running from the time of the entry of the rule for a judgment, and not from the time of filing the record. The statute of New York is similar to the law of Congress. The chancellor said, in the case cited: "The language of the statute, as contained in the recent revision, is that the writ of error shall be brought within two years after the rendering of the judgment or final determination of the court, and not after," &c. It will be perceived that the law of Congress of 1789 and the statute of New York are substantially the same. Both the law of Congress and the statute of New York differ from the English statutes, as they were when this decision was made. By the English statute, a writ of error could be brought within twenty years after the judgment record was signed and filed and judgment entered. By rule of the House

of Lords, an appeal must be brought within five years after the enrolment of the decree. In the case of Fleet *v.* Young, *supra*, the chancellor discusses the difference between the New York statute, and also says: "In point of principle, it is not very material whether one construction or the other is adopted, as the plaintiff in error may himself obtain permission to make up the record, if the adverse party neglects to do it within a reasonable time after the actual rendition of the judgment." (Jackson *v.* Parker, 2 Carnes's Rep., 385.) "And it is not necessary to wait for the filing of the record before a suit of error can be sued out. It is sufficient if the judgment is signed and filed at any time before the actual return of the writ of error, although after the return day is past." (Arnold *v.* Sanford, 14 John. Rep., 417.)

The case of Lee *v.* Tillotson, before the former Supreme Court of New York, (4 Hill, 27,) is also an authority in point. This was a motion by the defendant for leave to draw up a statement of facts from the aforesaid report made by the referees, and to have such statement settled and inserted in the judgment record, to the end that the defendant might bring a suit of error. It was objected that more than two years had elapsed since the decision of the motion to set aside the report, but not since judgment was perfected by filing the record, etc. The opinion of the court was delivered by Bronson, J., and he said: "Although it does not appear upon the papers that a rule for judgment was entered at the next term after the report was made, there can be no doubt that it was done, and, besides, if the rule was never entered, *it would be almost a matter of course to allow it to be done, nunc pro tunc.* But I think the question of limitation does not turn on the time of entering the rule for judgment, but on the time when the final determination was made on the motion to set aside the report. The rule for judgment was undoubtedly entered in May Term, 1837; and if they date from that time, the time for bringing a writ of error had expired before the motion for a rehearing was made, which was in May, 1840.

"The question then is, whether the limitation of the court, which was in July 1840, or from the subsequent filing of the judgment record, in January, 1841. The statute provides that 'all writs of error upon any judgment or final determination rendered in any cause, shall be brought within two years after the rendering of such judgment or final determination, and not after.' The judgment or final determination in this cause was rendered in July Term, 1840, when the motion which had been made to set aside the report of the referees

was denied. The record, which was afterwards filed, was not the judgment, but only a written memorial of the judgment which had been previously rendered. The Court of Errors arrived at the same conclusion on this question, in Fleet *v.* Young. It follows, that the time for bringing a writ of error has already expired, and we ought not to put the plaintiff to the expense and ourselves to the inconvenience of settling a case when we see it can do no good."

I have made this long extract from the opinion of Judge Bronson because, so far as this point is concerned, it is stated with his usual clearness and ability, and renders it unnecessary to add anything more on the point.

3. The last point, and which was the one principally discussed on the argument, is the effect of the *nunc pro tunc* clause added to the decree, signed, filed, and entered the 5th of February, 1858. In the case of Lee *v.* Tillotson, *supra*, it is said: "Such an order would have been a matter of course." The effect of it of course, if it has any effect, is to make the judgment relate back to the time when the decree should have been filed and entered. It is unnecessary to discuss the power and jurisdiction of the court to make an order *nunc pro tunc*, or the effect of such an order; all who are in any degree familiar with the practice of courts are aware that it is matter of frequent occurrence. The propriety of the order in the particular case is not of course to be considered; if there was power to make it, it must stand until in some way duly vacated. The counsel for claimant referred to many authorities, which it is deemed unnecessary to notice, with, perhaps, one exception. In the case of John Smythe and others, appellants, *v.* Richard Lomas Clay, respondent, (1st, *Brown's Parliamentary Cases*, 453, case No. 5 of Appeals,) the decree was actually enrolled within five years from the time of bringing the appeal, but more than twenty years after the decree was actually rendered.

It is unnecessary to examine this long case, but it seems to have been held that the enrolment of any decree pronounced by the court of chancery is deemed as being by legal relation the act of the same day on which the decree was pronounced.

I have come to the conclusion that the time was passed for any appeal in this case and shall order accordingly.

FLETCHER M. HAIGHT,
District Judge, U. S. Southern Dist. of California.

Appendix B.

Decision of Hon. Caleb B. Smith, Secretary of the Interior, ordering patent to issue to Gomez.

GENERAL LAND OFFICE, *April* 24, 1863.

I, James M. Edmunds, Commissioner of the General Land Office, do hereby certify that the annexed, on pages 1, 2, 3, 4, 5, and 6, is a true and literal exemplification of the original on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, [SEAL] at the city of Washington, on the day and year above written.

J. M. EDMUNDS,
Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Dec.* 29, 1862.

SIR: I have carefully examined the papers accompanying your communication of 29th October last, relating to the application for a patent for the "Panoche Grande" Mexican claim of Vincent Gomez in California.

From these papers the following facts are established:

Vincent Gomez made his application before the Board of Land Commissioners in California for the confirmation of an alleged grant, by the Mexican authorities in 1844, of four square leagues of land in Monterey county, California, which grant, he alleged, was lost or destroyed at Monterey, when that city was captured by the American army.

On the 6th March, 1855, the commissioners decided that the claimant had "given satisfactory proof of the existence and loss of the grant, but has failed entirely to offer any proof whatever going to show that he ever occupied, improved, or cultivated any part of the land, or that any person ever did for him, or that he ever saw the land." The commissioners, therefore, rejected the claim as invalid.

From this decision the claimant appealed to the District Court for the southern district of California.

After the appeal was taken, and before the trial of the case by the court, the Supreme Court of the United States decided

that neither improvement nor occupancy was necessary to give validity to grants made by the Mexican Government before the annexation of California to the United States. *From this decision, it appears that the land commissioners found all the facts which were necessary to give validity to the claim.* Had this decision been made before the commissioners decided the case, it is evident they would have confirmed the grant.

On the 5th June, 1857, the District Court for the southern district of California made an entry upon their minutes that, "being fully advised in the premises, delivered its opinion, confirming the claim of the appellants to the extent called for in the transcript and papers—three leagues *or sitios de yanada*, and a decree was ordered to be entered up in conformity to said opinion."

No formal decree was signed and entered upon the records at that term; but, on the 5th of February, 1858, at the next term of the court, a full and final decree was signed by the court, and entered upon the records, which described the land by boundaries, and decreed that the decision of the land commissioners was reversed, "and that the claim of said appellant is good and valid, and the same is hereby confirmed to him." The decree also recited that the claim had been confirmed, on the 5th June, 1857, by the court, at a regular term, but it had been omitted by the court to sign the decree at the time it was made.

It was therefore ordered that the decree be signed "now as for then." This was a decree *nunc pro tunc*, and had relation back to the time when the order of confirmation was made by the court.

On the 21st March, 1861, several regular terms of the court having intervened, the court made an order setting aside all previous proceedings in the case, and placing the same on the calendar for trial *de novo*. On the 4th day of August, 1862, the court, at a regular term, made an order vacating the previous order granting a new trial, and ordering that it "be and the same is hereby vacated and set aside." These several decrees and orders constitute a confirmation by the court of the grant of the claimant, and entitle him to a patent, unless it shall be apparent that some proceedings have been instituted on behalf of the United States, by way of appeal or otherwise, which will require a review or re-examination of the case.

The case was docketed in the Supreme Court, at the December Term, 1858, as an appeal from the District Court of California, and the appeal was dismissed on the motion of the

appellee, and a mandate granted to the District Court to execute the decree of confirmation. At the December Term, 1859, on motion of the Attorney General, the order dismissing the appeal was vacated, and the mandate was recalled. The effect of this order was to leave the case as though no appeal had been taken, and to authorize an appeal on behalf of the United States.

No appeal appears to have been subsequently taken until the 25th August last, when an order for an appeal to the Supreme Court of the United States was made by the District Court of California. On the 4th of the present month, the District Court vacated the order allowing the appeal, and set aside the motion of the District Attorney asking leave, on behalf of the United States, to take an appeal to the Supreme Court, from the final decree of confirmation, and denied the same.

This proceeding appears to me to be final and conclusive in the case. The time within which by law, an appeal may be taken has elapsed, and the decree of confirmation made by the District Court, therefore, fixes and determines the rights of the claimant.

It appears, from the opinion of the Supreme Court of the United States before referred to, that the District Attorney who represented the United States when the decree of confirmation was made, was interested in the claim at that time, and it is alleged that he fraudulently assented to the decree. Questions of fraud, which have been raised in the case, cannot be examined or determined by this department.

The only questions to be considered are, has the grant been confirmed by the decree of the proper court, and are there any legal proceedings pending to reverse or set aside that decree? Upon both of these questions, it appears to me the answer must be in favor of the claimant.

The act of 14th June, 1860, which requires the Surveyor General to publish for a given time the fact of the survey, with a view of affording to persons interested an opportunity to contest the boundaries fixed by the survey, is directory to that officer. The law directs this proceeding before the survey shall be reported to the General Land Office. The survey having been reported in this case, the presumption arises that the Surveyor General has performed all the prerequisite duties enjoined by the law.

Besides, by the law of June 2d, 1862, the proper officers are required to survey such grants upon the application of the claimants, they paying or securing the expense, and such

survey is declared to be but *prima facie* evidence of the true location of the land claimed or granted. Of course, it is the duty of the Surveyor General to report such survey to the General Land Office, which has been done in this case. The survey is but *prima facie* evidence of the true location, and a patent will be but *prima facie* evidence of title.

No notice has been presented of any conflicting claim, and, should such arise, the parties cannot be precluded by a patent.

The order of Secretary Thompson against the issue of a patent in this case, based upon the letter of Attorney General Black, was founded upon the assumption that further proceedings would be instituted to reverse the decree of confirmation of the District Court. No such proceedings are now pending, and the time within which any further appeal can be presented has elapsed.

My conclusion is, that the decree of the District Court for the Southern District of California, confirming the grant, has become final. The United States has no longer any interest in the controversy. No claim of third parties has been interposed. The suggestions of fraud in the grant, or in the manner of procuring its confirmation, are *res adjudicata*, and I am unable to discover any reason why a patent should not be issued in conformity with the decree of the court and the survey.

You will therefore issue a patent for the land in accordance with the survey, as reported by the Surveyor General.

The papers pertaining to the case are herewith returned to your office.

Very respectfully, your ob't serv't,

CALEB B. SMITH,
Secretary.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

10

40TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES.

WILLIAM McGARRAHAN,

[To accompany bill H. R. No. 65.]

MAY 8, 1868.—Ordered to be printed.

Mr. WILSON, from the Committee on the Judiciary, made the following

REPORT.

The Committee on the Judiciary, to whom was referred a bill for the relief of William McGarrahan, respectfully submit the following report:

The history of this case is composed of such a multitude of circumstances, spread over a period extending from the year 1844 to the present time, that to give it in detail would be to present a report so voluminous as to defeat the very object contemplated by the House in submitting it to the committee—that of information to its members.

It has, therefore, been deemed advisable to exhibit leading and controlling facts, rather than minute and unimportant particulars.

The effort has been to give the present paper a synoptical rather than argumental character, as it is believed a plain but abbreviated narrative will be sufficient to satisfy all inquirers that the bill herewith reported should pass.

An impartial statement of the facts and of prominent proceedings is, in the judgment of the committee, all that is needed to show that Mr. McGarrahan is entitled to the relief he seeks, and to the land in question, as described in his original memorial presented to the House during the thirty-ninth Congress.

In the year 1844, Manuel Micheltorena, the then governor of Upper California, in accordance with a Mexican custom to confer lands upon deserving officials and citizens, granted to Vincent P. Gomez a tract of land, then, it would seem, considered almost valueless, and situate in the present counties of Fresno and Monterey, State of California. The property was then, and is now, known as "Panoche Grande rancho."

The making of this grant has been denied, and this denial constitutes the principal ground from which has sprung the prolonged and exhausting litigation in the case, extending over a period of more than thirteen years.

The proof of the existence of the grant is satisfactory. It is found mainly in the following facts:

I. The deposition of José Castro, who filled the office of political chief of California, and was also prefect and commandant general, which states that Gomez, with whom he was well acquainted, desired him (Castro) to inform him (Gomez) of a suitable place to petition for or secure, and that he recommended the Panoche Grande.

II. The petition of Gomez to Governor Micheltorena, March 13, 1844, requesting a grant of the rancho.

III. A marginal entry made by the governor, March 14, 1844, on the petition of Gomez, that the proper secretary should cause the necessary investigations to be made and make report.

IV. A declaration of the same date, by Manuel Jimino, the secretary, that the petition of Gomez had been transmitted to the first justice

of San Juan, in order that he should report what would be just in the matter.

V. The report of the justice, dated March 20, 1844, stating that the land was vacant, and that there was no reason why the same should not be granted.

VI. A map of the land, filed in pursuance of the justice's report.

VII. The affidavit of Valentine Gajiola, employed in the Presidial Company of Monterey in 1848, showing that Gomez applied to him to make a map of the rancho; exhibited to him the title papers duly executed, and that he made the map as desired.

VIII. The deposition of José Abrigo, the head of the commissary department, and resident in Monterey, proving that Gomez was a clerk in his office, and that, in 1845, he (Gomez) showed him a title to the land named, together with a map of the property; that the papers were signed by the governor and secretary, and that he was well acquainted with the signatures of these officers, having often seen them write; that the archives in which their papers were passed into the possession of the American army July 7, 1846.

IX. The testimony of Abrigo, Dr. James L. Ord, a surgeon in the United States army, and others, proving the destruction of the archives in Monterey, and the fact that such destruction is generally admitted.

X. The deposition of Oscar De Grandé Basque, stating that Gomez, in 1845, showed him title papers for the rancho, and proposed a sale of the land to him.

XI. The affidavit of J. Marno Bonilla, secretary of the superior tribunal of justice in Monterey, stating that Gomez, in 1844, applied to him for stamped paper, to be used in procuring a title to lands; and that, in 1845, he saw memoranda of grants of land, among which was that of Panoche Grande to Gomez.

XII. The affidavit of Matias Moreno, Secretary of State of Upper California, stating that, in 1846, he knew Gomez had obtained a grant for Panoche Grande, and that he saw the grant.

XIII. The affidavits of Maricio Gonzales, José Fernandez, Gabriel de la Torre, Joaquin S. Escamilla, and others, tending to prove the existence of the grant.

XIV. Statement of E. L. Goold, Esq., before the Judiciary Committee, that he believed the petition of Gomez was a genuine document, and that he based his opinion on his knowledge of the facts and circumstances connected with the case of said Gomez against the United States, which involved the validity of the grant upon which this case is based. Mr. Goold was of counsel in said case in opposition to the grant, and appeared as a witness before the committee on behalf of the opposing parties.

XV. The grant by Governor Micheltorena, in the year 1844, to Don Julian Ursua, of the tract known as the rancho "La Panache de San Juan and Los Carrisalitos," wherein the tract is described as being bounded on the south by the mine of "Los Aguilas" and "La Panoche Grande."

XVI. Statement of Henry D. Cooke, Esq., that when he was in California, in the years 1847–48–49, it was common report that Gomez had received a grant of a rancho near San Juan from the Mexican Government.

XVII. In 1845 the board of land commissioners, at the hearing on the evidence, as required by the laws of the United States, decided that Gomez had given satisfactory proof of the existence and loss of the grant.

1. In the treaty of Guadalupe Hidalgo, entered into between the United States and Mexico, February 2, 1848, it was provided that property of every kind belonging to Mexicans should be inviolably respected, and that the United States should pass such laws as would give effect to the differ-

ent stipulations of the treaty, and always therefore [illegible] them. This feature was introduced to secure all landed [illegible] ests that might in any way be affected by a change of jurisdiction [illegible] the territory embraced in the treaty. (Stats. at Large, vol. 9, pp. 229–[illegible]

2. The law contemplated was passed March 3, 1851, (United States Statutes at Large, vol. 9, p. 631,) creating a board of land commissioners, and declaring, among other things, "that each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican Government, shall present the same to the said commissioners, when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claim; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and within thirty days after the said decision is rendered to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered." (Sec. 8.)

3. February 9, 1853, Gomez, in accordance with the provision of the act of March 3, 1851, presented his petition to the Board of Land Commissioners, praying a confirmation of his claim to the rancho Panoche Grande.

4. The board, having fully heard the evidence of the grant, decided that the claimant had given satisfactory proof of the existence and loss of the grant, but had failed entirely to offer any proof whatever going to show that he ever occupied, improved, or cultivated any part of the land, or that any one ever did for him, or that he ever saw the land; and on the ground of non-occupancy decided the grant invalid.

5. In the case of Fremont *vs.* the United States, (17 Howard, 542,) decided at December term, 1854, the Supreme Court of the United States held that, in the case of Mexican land grants, omission to take possession of the land did not of itself forfeit the right or grant. Had this determination preceded the action of the Board of Land Commissioners, the grant to Gomez would certainly have been pronounced valid, as the board decided against the grant on the ground that the grantee had not entered upon and possessed himself of the land granted.

6. The decision of the Board of Land Commissioners made an appeal necessary, which was accordingly taken by Gomez, and June 5, 1857, the district court for the southern district of California confirmed his claim, and a decree to that effect was pronounced. But through what is claimed to have been a clerical mistake, and which the party asserts was unobserved for some months, the decree was for three leagues of land instead of four, as claimed, and as proved by the deposition of José Abrigo, used before the Board of Land Commissioners, and in the court, to have been comprised in the grant, and was unsigned by the judge.

7. Thus, as Gomez, his counsel, and all interested might well have supposed, the question of title was settled, subject, of course, to the right of appeal. The records of the district court presenting Gomez as owner of the rancho in accordance with the finding of the Board of Land Commissioners, the decree of the said district court, and the decision of the highest court in the Fremont case, Mr. McGarrahan, December 22, 1857, bought the property from Gomez in good faith, and for a valuable consideration.

8. The alleged error in the quantity of land stated in the decree of June 5, 1857, being discovered, an application was made to the court to correct it; whereupon, February 8, 1858, an amended decree was entered

nunc pro tunc, (that is as of June 5, 1857,) covering the four leagues, and duly signed.

9. About the time Mr. McGarrahan purchased from Gomez, some persons having prospected the land, discovered mineral deposits, (a fact unknown to Mr. McGarrahan when he purchased,) and finding it had been sold by Gomez, they, as "squatters," took possession of and held it, as they still hold it, either in person or by assignees, cognizant of the facts, and without title.

10. March 15, 1858, the United States appealed from the decree of the district court, as it seems was their practice to do in all cases adjudicated against them, and on July 8, 1858, thirteen months after the final decree of confirmation, a motion was made by special counsel of the United States in the case, as it seems, without notice to the claimant, to have the decree opened.

11. Mr. McGarrahan having been advised that the appeal to the Supreme Court had been taken by the Government, without examination as to its merits, in accordance with the uniform practice, made application through counsel to Hon. Jeremiah S. Black, the then Attorney General, (a certified transcript of the case being presented to him) to have him examine the case and determine whether he would persist in the appeal.

12. After full argument before the Attorney General, that officer directed that the appeal should be docketed and dismissed; and on January 31, 1859, it was so entered upon the books of his office and upon the records of the Supreme Court. Whereupon, in March, 1859, the Supreme Court issued its mandate, which ordered and decreed the docketing and dismissal of the appeal entered in the Supreme Court, and commanded that "such proceedings be had in said case as, according to right and justice and the laws of the United States, ought to be had."

13. The said mandate was filed in the district court May 4, 1859, whereupon the court ordered, adjudged, and decreed that the said mandate should be carried into effect, and that the said Gomez proceed under the decree of the court as under a final decree.

The effect of this was to perfect the title to said rancho in Mr. McGarrahan, as the grantee of Mr. Gomez.

At this stage of the case the most vigilant lawyer consulted by client, and required to examine records, could have given no other opinion upon the state of the records than that a fee-simple interest in the rancho was vested in Mr. McGarrahan.

From this time the parties occupying the property, without title or rightful claim, resorted to divers expedients to defeat McGarrahan's title; accordingly the "squatters" interest, so called, which vested in the New Idria Mining Company, appealed to controlling officers of the Government. This is shown by the following facts:

1. A consultation between Mr. E. L. Goold, counsel for the "squatters" upon the property alluded to, with the Attorney General, and immediately thereafter that officer making a motion in the Supreme Court to recall the mandate before spoken of, on the ground of fraud and want of jurisdiction.

2. The alleged fraud was declared to consist in the fact that a conveyance of an undivided half interest in the property had been made by Gomez to Pacificus Ord, then representing the United States as district attorney, and that he had consented to the propriety of the original decree of June 5, 1857.

3. It is shown that Mr. Ord, after his appointment to the office he held, not only revealed to the Government the fact that he was interested in the claim, but requested the Government to employ other counsel to attend to its interests.

4. This the Government did not do; the management of which was that Mr. Ord, at the time of the original decree, having no evidence [illegible] itating against the validity of the grant, acquiesced in its confirmation; and, so far as this committee can discover, the representation then made by Mr. Ord was in accordance with facts.

5. At this point in the proceedings, it appeared that some influence, unknown to the committee, had caused the file-marks and indorsements on the final order of the district court, made in obedience to the mandate of the Supreme Court, to be erased from the record, as well as the filing of the mandate itself. This seems to have been done on the 18th of January, 1860, more than eight months after the order had been filed. It also appears that certain entries in the books of the Attorney General's office respecting the original appeal in this case, and the action of the Government in other appeals, embraced in the same order, were not known to the court or to McGarrahan's counsel in time for them to avail themselves of the benefits thereof, on the hearing of the case in the Supreme Court, on motion by the Attorney General to revoke the mandate. It will be remembered that it was upon the conclusive evidence of his order that the Supreme Court had directed the proper entry to be made upon their record, and that their mandate was issued.

6. This failure to disclose the facts to the court, by the Government, undoubtedly had much to do in securing the order of the Supreme Court revoking their mandate of 1859, and which order was strangely withheld until June, 1862, when it was filed by the present claimant for the purpose of again lodging jurisdiction of the case in the court below.

7. But, in the meantime, (March 21, 1861,) the district court annulled its original decree. This extraordinary action on the part of the court seems to have been taken without notice, either to the claimant or his known counsel, and in the absence of both.

8. As soon as this condition of things was ascertained, an application was made to the court to restore the decree, and, upon full hearing, the order, as requested, was made on the 4th August, 1862.

9. Thus matters rested until the 25th August, 1862, when the then district attorney, contrary to express stipulations, entered into between himself and the counsel for the claimant, in their absence, and without notice, obtained an order of appeal to the Supreme Court.

10. The impropriety of this proceeding is made apparent for the reason that, in order to give the Supreme Court jurisdiction, a citation should have been first issued, signed by the judges, served on the claimant, and formal return made, with proof of service.

11. The law is very clear upon this point; the acts of 1789 and 1803, which regulate appeals, (the appeal not having been taken in open court at the June term in 1857, when the original decree was pronounced, nor at the December term in 1857, when the decree was entered *nunc pro tunc*, or, in other words, within five years, as directed by the statutes,) demanded a notice to the opposite party, and the proceeding was therefore clearly wrong. The court, upon a full hearing, reached this determination, and accordingly decided, December 4, 1862, that the appeal allowed August 25, 1862, be vacated and set aside, and that an appeal on behalf of the United States to the Supreme Court be denied.

Here, for the second time, the record evidenced a perfect title in the claimant.

It having been twice judicially determined by the action of the courts that Mr. McGarrahan was the legal owner of the Rancho Pancho Grande, the aggressors upon his rights resorted to a new line of action.

1. As seen, after nine years of ligitation, Mr. McGarrahan, the present claimant, succeeded in acquiring two distinct confirmations of his title.

It was then, in accordance with the act of Congress of June, 1862, he applied to the United States surveyor general of California for a survey of the said tract of land, and which officer caused the survey to be made, and approved September 11, 1862. This survey was transmitted immediately thereafter to the Goneral Land Office, and a patent for the property was demanded.

2. Here, again, he was confronted by the New Idria Mining Company, before referred to. The Secretary of the Interior at that time, (Hon. Caleb B. Smith,) after argument in the case, ordered the patent to issue.

Thus, again, for the third time, the title to the Panoche Grande was found to be in Mr. McGarrahan. Some unknown cause delayed the execution of this order, and the patent was not issued. This neglect, or refusal, was persisted in throughout the remainder of Mr. Secretary Smith's term. The matter was then brought to the notice of Mr. Usher, the new Secretary, before whom it was again argued, and by whom a patent was directed to be issued. Neither the order of Mr. Smith nor Mr. Usher was obeyed, for some reason not yet divulged or ascertained.

For the fourth time, the title of Gomez and his grantee was decided to be good and available in law. A request was then made by the claimant of President Lincoln that he would make an examination of the case, and determine it upon its merits. This he consented to do. Printed briefs were laid before him; and, upon full consideration of all the facts and circumstances, he directed the Secretary of the Interior to cause a patent to issue to Mr. McGarrahan. And thus, for the fifth time, Mr. McGarrahan was declared to be entitled to the property or rancho, and that neither the United States nor any other person had lawful claim to the same.

In accordance with this order of the President of the United States to the Secretary of the Interior, a patent was actually made out; but, for reasons not fully explained, never delivered to him for signature.

To recapitulate:

1. The proof of a legal grant from the Mexican Government to Gomez and the transfer of title to McGarrahan are clearly and indisputably shown.

2. The district court of the United States for the southern district of California confirmed the grant.

3. The Attorney General of the United States declared the title to the lands to be in Mr. McGarrahan, and caused an entry to that effect to be made on the books of his office and in the Supreme Court.

4. Hon. Caleb B. Smith, Secretary of the Interior, after examination and consideration of the case, ordered a patent to be issued to Mr. McGarrahan.

5. Mr. Usher, the successor in office of Mr. Smith, similarly decided.

6. Mr. Lincoln, after inquiry, decided the grant to be genuine, and that a patent should be issued to Mr. McGarrahan.

From the time when the district court pronounced its decree of confirmation, (June 5, 1857,) and the President's action on the case, (in the fall of 1863,) it will be observed, over six years had elapsed, and, in consequence of the lapse of time, an appeal could not be had according to law, unless something should appear to avoid the limitation.

In December, 1863, a paper, purporting to be a transcript of proceedings as they appeared on the records of the district court, was prepared in the Attorney General's office in Washington, District of Columbia, forwarded to the district attorney in California, certified by him out of his district, without comparison with the record, and merely from memory, and from which transcript were omitted material parts of the record, and returned to Washington.

Upon the transcript thus made up, the case was again brought before the Supreme Court, which being discovered by the claimant, a motion was made to strike off the appeal, which was refused, although it, as it seems

to the committee, was out of time, and the transcript had been [illegible] without reference to the actual records of the district court.

Notwithstanding the Supreme Court refused to strike off the appeal taken in the manner indicated, a new transcript was obtained 1866, from the clerk of the district court, and filed at December term, 1865, eight years and a half after the decree of the district court confirming the title was first pronounced, and more than three years after the period had elapsed within which the law allowed an appeal to be taken in the case, unless some exception takes it out of the limitation. Upon this appeal the Supreme Court, in March, 1866, decided the case against the claimant, and thus matters now stand.

The committee have bestowed a great deal of time and labor upon this case, in order to arrive at its real facts and merits. The claimant and the parties resisting his claim have been heard patiently and at great length.

In presenting the conclusion at which the committee have arrived they do not wish to be understood as undertaking to review and reverse the action of the Supreme Court relative to the case. Under and by virtue of the right of petition the claimant has presented his case to Congress, and the House of Representatives directed this committee to inquire into the grounds of his complaint. This has been done. Many facts have been presented to the committee which were not placed before the court. Additional evidence has been submitted and circumstances disclosed which have induced your committee to conclude that the relief prayed for by Mr. McGarrahan ought to be extended to him; and this may very readily be done. The title to the land claimed, and which he asks that he may be allowed to purchase, is now vested in the Government of the United States, and it is merely a question whether he shall be permitted to secure that which, in the judgment of your committee, he acquired title to by virtue of the Mexican grant aforesaid, or it shall fall into the hands of a corporation known as the New Idria Mining Company, which has been resisting his claim for years and paying the expenses of the efforts of said company out of the proceeds of the mines, the title to which rests in the United States.

It is clear that McGarrahan purchased the property in good faith, and for a valuable consideration, when it was regarded as of but little value. His interests have been attacked and his title resisted, nominally, by the United States, but really by the New Idria Mining Company. The name of the United States, their officers and money, have been used to resist his claim, and all to the end that this property, valuable as it now undoubtedly is, may pass into the hands of parties who are wholly unknown to the record of the proceedings had in the courts of the United States, respecting the title to the land in question, through all its years of transit from the board of land commissioners to and through the Supreme Court of the United States.

The company aforesaid placed before the committee a memorial, in which the case is stated as follows:

"The real parties who contested the grant were your memorialists for against them only were the efforts of the owners of the 'Panoche Grande rancho' directed. For the New Idra mines, and for the fruits of the labor of those who have developed them, the owners of the 'Panoche Grande' are now seeking congressional interference in their behalf. It may well be doubted whether the 'Panoche Grande' would ever have been heard of in the district court of the United States or in Congress but for the hope of robbing your memorialists of the fruits of their years of labor and vast expenditures of money."

This extract shows that the United States have no interest as between

these parties beyond that of preserving its faith as pledged in the treaty made between this Government and that of Mexico. And as to the allegation of robbery, &c., made by said company, it may be remarked that one of its stockholders, of large interest, testified before the committee that after paying all of the expenses of said company, including every outlay, a balance would be left in its treasury on account stated.

The precedents are numerous where the Congress has afforded redress in cases of an analogous character. The following are referred to:

I. The Soscol act, 12 U. S. Stats., p. 808.
II. The Bolsa de Jomales act, 13 U. S. Stats., p. 136.
III. Ex-Mission San José act, 13 U. S. Stats., p. 584.
IV. Laguna de Santos Calle act, 13 U. S. Stats., p. 372.
V. Baron de Bastrop act, 9 U. S. Stats., p. 597.

In addition to which we have the act of June 21, 1860, and the act of March 1, 1861.

In view of all the facts developed in the case, and believing that justice and equity demand that the relief prayed for by the claimant be extended to him, the committee recommend the passage of the bill herewith reported.

40TH CONGRESS, 1st Session. } H. R. 65. { REPORT No. 5.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 18, 1867.

Read twice and referred to the Committee on the Judiciary.

MARCH 26, 1867.

Reported from the said committee without amendment, ordered to be printed, and recommitted to the said committee.

Mr. JAMES F. WILSON, on leave, introduced the following bill:

A BILL for the relief of William McGarrahan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the tract of land known as the Panoche Grande rancho, in the State of California, granted by Governor Manual Micheltorena to Vincente P. Gomez in the year eighteen hundred and forty-four, and by said Gomez conveyed to William McGarrahan on the twenty-second day of December, eighteen hundred and fifty-seven, surveyed by the United States surveyor general for the State of California, and approved by him on the eleventh day of September, in the year eighteen hundred and sixty-two, and which said survey is now on file in the General Land Office, be, and the same is, in all respects, hereby fully confirmed to said William McGarrahan, upon this condition, however, that the said McGarrahan shall, within twelve months after the passage of this act, pay into the treasury of the United States the sum of one dollar and twenty-five cents per acre for the lands embraced within the said survey.

SEC. 2. *And be it further enacted*, That upon the payment of the said sum of money to the Treasurer of the United States by said McGarrahan, the said Treasurer shall give a certificate therefor, and upon the presentation thereof to the Commissioner of the General Land Office, a patent shall be issued to said William McGarrahan for said lands.

Appendix D.

RESOLUTION OF HOUSE OF REPRESENTATIVES, OF THE FORTY-FIRST CONGRESS, DIRECTING A DETERMINATION OF THE GOMEZ CASE, IRRESPECTIVE OF ANY AND ALL LEGAL PROCEEDINGS SINCE THE ISSUE OF THE PATENT, MARCH 14, 1863.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, directed to cause the record on pages three hundred and twelve to three hundred and twenty-one inclusive, in volume four of "California Land Claims," of the patent of a tract of land known as the "Panoche Grande," as set forth therein, to be transcribed into the records as the same stood on the record-book of the General Land Office at the time it was examined, without any mutilation or erasure whatever, so that the legal effect of the record so transcribed shall be the same as if the original record had never been interfered with or mutilated; and when such record shall have been so made, as herein provided, it shall be marked *examined*, as it was originally marked. *And the President of the United States is hereby authorised and required to do in the premises whatever may, in his judgment, be just and equitable, without* REGARD TO ANY ACTION, OR PROCEEDING HAD SUBSEQUENT TO THE 14TH DAY OF MARCH, 1863, THE DATE OF THE PATENT RECORDED.

I, George M. Adams, Clerk of the House of Representatives, hereby certify that the foregoing is a true copy of a resolution which was passed by the House of Representatives February 20, 1871, as appears from the records on file in this office.

Given under my hand, and the seal of the House of Representatives, this 10th day of November, 1877.

GEORGE M. ADAMS,
Clerk.

Appendix E.

LETTER OF HON. F. M. HAIGHT TO ATTORNEY GENERAL BATES.

MONTEREY, *July* 25, 1863.

HON. EDWARD BATES.

DEAR SIR. By this mail you will be forwarded copies of all papers and orders in the District Court, and copy of bill filed in Circuit Court. I had intended to review more particularly

these parties beyond that of preserving its faith as pledged in the treaty made between this Government and that of Mexico. And as to the allegation of robbery, &c., made by said company, it may be remarked that one of its stockholders, of large interest, testified before the committee that after paying all of the expenses of said company, including every outlay, a balance would be left in its treasury on account stated.

The precedents are numerous where the Congress has afforded redress in cases of an analogous character. The following are referred to:

I. The Soscol act, 12 U. S. Stats., p. 808.
II. The Bolsa de Jomales act, 13 U. S. Stats., p. 136.
III. Ex-Mission San José act, 13 U. S. Stats., p. 534.
IV. Laguna de Santos Calle act, 13 U. S. Stats., p. 372.
V. Baron de Bastrop act, 9 U. S. Stats., p. 597.

In addition to which we have the act of June 21, 1860, and the act of March 1, 1861.

In view of all the facts developed in the case, and believing that justice and equity demand that the relief prayed for by the claimant be extended to him, the committee recommend the passage of the bill herewith reported.

40TH CONGRESS, 1st Session. } H. R. 65. { REPORT No. 5.

IN THE HOUSE OF REPRESENTATIVES.

MARCH 18, 1867.

Read twice and referred to the Committee on the Judiciary.

MARCH 26, 1867.

Reported from the said committee without amendment, ordered to be printed, and recommitted to the said committee.

Mr. JAMES F. WILSON, on leave, introduced the following bill:

A BILL for the relief of William McGarrahan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the tract of land known as the Panoche Grande rancho, in the State of California, granted by Governor Manual Micheltorena to Vincente P. Gomez in the year eighteen hundred and forty-four, and by said Gomez conveyed to William McGarrahan on the twenty-second day of December, eighteen hundred and fifty-seven, surveyed by the United States surveyor general for the State of California, and approved by him on the eleventh day of September, in the year eighteen hundred and sixty-two, and which said survey is now on file in the General Land Office, be, and the same is, in all respects, hereby fully confirmed to said William McGarrahan, upon this condition, however, that the said McGarrahan shall, within twelve months after the passage of this act, pay into the treasury of the United States the sum of one dollar and twenty-five cents per acre for the lands embraced within the said survey.

SEC. 2. *And be it further enacted*, That upon the payment of the said sum of money to the Treasurer of the United States by said McGarrahan, the said Treasurer shall give a certificate therefor, and upon the presentation thereof to the Commissioner of the General Land Office, a patent shall be issued to said William McGarrahan for said lands.

Appendix D.

RESOLUTION OF HOUSE OF REPRESENTATIVES, OF THE FORTY-FIRST CONGRESS, DIRECTING A DETERMINATION OF THE GOMEZ CASE, IRRESPECTIVE OF ANY AND ALL LEGAL PROCEEDINGS SINCE THE ISSUE OF THE PATENT, MARCH 14, 1863.

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MONTEREY, *July* 25, 1863.

HON. EDWARD BATES.

DEAR SIR. By this mail you will be forwarded copies of all papers and orders in the District Court, and copy of bill filed in Circuit Court. I had intended to review more particularly

your letter, and the papers in the case; but a decent self-respect has determined me to merely have you furnished with all papers; and my opinions and judgments, I am happy to say, are subject to correction and revision. As to Panoche Grande, you are undoubtedly aware that the parties in possession claim under school land warrants, and the other side under grant and confirmation. In this, as in other cases, *private interests stimulate prejudices*, and it is quite probable, as in the New Almaden case, the Government will shake the bush, and others catch the bird.

In regard to a transcript, to be used on appeal, to be made out by the clerk, I have only to say, that one has been refused on the ground that *no appeal was granted or is pending*, and, in my judgment, the clerk has acted in conformity to his oath and duty.

Very respectfully, your obedient servant,

F. M. HAIGHT.

Appendix F.

LETTER OF JOHN O. WHEELER TO ATTORNEY GENERAL BATES.

OFFICE CLERK OF U. S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
MONTEREY, *August* 24, 1863.

HON. EDWARD BATES,
Attorney General U. S., Washington.

SIR: On the 10th inst. E. L. Goold duly presented to me a written demand for "a certified transcript of the papers, documents, and proceedings" in the case of Vicente P. Gomez *v.* the United States, together with what purports to be a copy of his authority from you to act in the premises, which, or copies of which, are herewith annexed.

Busily engaged in the canvass now pending against copperheadism, rendered doubly perilous through the frightful mistake of Government in temporarily espousing the interests of land-grabbers seeking to rob the owners of the New Almaden mines in this State, I have been unable until the present to give this matter my attention.

Whether the "authority" be authentic, or if so, whether it involves any legal obligation upon my part to recognize Mr. Goold as an officer of the Government, are questions I do not propose now to discuss. For my present purpose I will consider him as your representative, and his acts in con-

nection with the Gomez case as yours, inasmuch as you have indorsed him.

In order that my connection with this affair may be thoroughly understood, so far as it relates therefore to the Attorney-General's office, I will state briefly, that in the month of October, 1862, Mr. Goold, your special agent, then in San Francisco, where I happened at that time to be, requested of me a transcript of the Gomez case, for and in behalf of Daniel Gibbs and others, then in possession, by virtue of school land warrants, of the property involved in the Gomez case. I agreed to furnish him with such transcript upon the prepayment of fees. At his dictation I drew up an account against said Gibbs and others, for the sum of $150, which amount he obtained from Gibbs at once, and used it in a trip to Washoe. Disgusted with his sharp practice, I subsequently, to wit, about the 1st of December, of the same year, when he again demanded a transcript, peremptorily refused it.

In the month of April last, and subsequent to the vacation of appeal in said case, the district attorney for this district exhibited to me a dispatch from you, to him directed, in which he was directed to demand of me the records of my office pertaining to the Gomez case, under and in virtue of the "law of '61." A copy of the dispatch embodied in my answer, dated April 7, 1863, to a demand then made, is annexed hereto. To my reasons for refusing to accede thereto, set forth in said answer, you are referred. I still entertain the same opinions.

Again, on the 17th of April last, S. M. Wilson, the counsel of record in the case at bar, associated with Mr. Goold as attorneys of said Gibbs *et al.*, then in attendance upon the third judicial district court, in this city, upon the part of said Gibbs and others, defendants in an action of ejectment brought by the legal representative of Gomez, demanded of me a transcript, which was refused.

On the 25th July last, in deference to your wishes, (as expressed in a letter to Judge Haight,) to be placed in possession of the record in the Gomez case, for the information of the Attorney-General's office, I, at his request, made out a complete record of the proceedings in this court, which were duly transmitted to your address. If desirous of *information* only, I presumed the vexatious question was at rest.

On the 27th July last, the district attorney exhibited to me your communication to him of 9th June, 1863, a copy of Goold's purported authority, as also a letter from the latter

person to said district attorney, in virtue of all which he made a verbal demand for the record; but being informed that a record had been made out, and the same transmitted by Judge Haight, he at that time made no further effort in the premises. Subsequently, however, and since the formal demand by Goold, and without awaiting my promised written answer now given, and at the suggestion, I believe, of Isaac Hartman, (the counsel for Gomez, who procured the confirmation of the grant,) another of the peripatetic agents of the United States, an affidavit has been drawn up, duly sworn to, and by that gentleman transmitted to your office.

As the matter of fees in this question has claimed no little attention from the different correspondents, I may be permitted to refer to the subject, to show the very creditable manner in which agents of the United States deal with clerks, as perhaps with others. Your letter above referred to says: "I have caused money to be transmitted to the marshal of your district, and I have directed him to pay on your order, or that of Mr. Goold, your associate in this case, the sum of money charged as fees for a transcript," etc.

Mr. Goold's letter, dated in San Francisco, asserts that a draft for the purpose on that day was forwarded to the marshal. These letters were shown in order to assure me that no difficulty existed so far as my fees were concerned.

Not entirely ignorant of the characteristics of special agents, I forwarded a letter of inquiry to the marshal, who in his answer, dated the 1st of this month, informs me he had neither received money or instructions, and knew nothing of it. I was not surprised; of course not disappointed.

Inasmuch as Mr. Goold is by you recognized, and has so been recognized as special agent in this Gomez matter, I find the record of the Attorney General's office to be something as follows: It has used the clerk of this court in order to obtain, under false pretences, the sum of $150 to defray the expenses of its special assistant or agent to the mines of Washoe. It has attempted to trick the clerk into a violation of his duty through a false application of the law of 1861. It has attempted to obtain a transcript in the name of the United States, for the express use, benefit, and behoof of parties adverse to the claimant, and also to the United States in this case. It has attempted to influence the clerk by erroneous representations, to the effect that certain moneys existed in the custody of the marshal, which, in point of fact, were absolutely false; and further, it has, as appears by your letter of date the ———, ——, and addressed to his Honor Judge Haight, in-

dulged in coarse criticisms and insinuations against the clerk; and finally threatened that very humble individual, unless he can be rendered subservient to its behests.

Now, sir, why the necessity for all this? Either you are right in the premises, or you are wrong. If the former, then the laws of the land are adequate for your purpose. If the latter, a further persistence in past annoyances will be as barren of results.

In your communication to Judge Haight you desired a record for information. That has been furnished. In your subsequent communications to the district attorney and Mr. Goold you desire it for purposes of an appeal. Such a record I decline to furnish, for the simple reason that no appeal exists or is pending. You have charged that I was usurping the province of a judge in undertaking to determine that no appeal existed. On the contrary, I simply exercise common sense in the performance of a plain duty. As the custodian of the records of the court, charged with entering up its orders and decrees, I am supposed and required to know the status of the cases in my office. For example: under the regulations of the General Land Office no patent issues upon California land titles in this district, except upon my certificate that the five years has elapsed from and after the confirmation, and no appeal is pending, and the claimants entitled thereto. Numbers of such certificates have been sent to Washington, and my authority so to do is not questioned. But when I virtually do the same thing in the Gomez case, I meet with charges, emanating from the Attorney General's office, reflecting upon my honesty and capacity. I have no desire to trend upon the province of the court. I enter up its decisions, and, when required, state officially what they are. On the contrary, the Attorney General's office seems to hold its decisions and orders as wholly subordinate to its authority, and the clerk but a convenient instrument with which to nullify its action and further the interests of parties who may happen to be in the interests of said office. In my case such presumption will not hold. I undertake to act in my official capacity in accordance with my views of duty, under the advice and with the sanction of the court whose officer I am; and with his approbation I am undisturbed by fulminations from Washington or elsewhere.

In your communication of date the , you charge me with undertaking to decide that the United States possesses no interest in the Gomez case.

In my answer to the district attorney, of date the ,

already referred to, and upon which you doubtless predicate the charge, I did make such assertion; but it can hardly be characterized as a decision or judgment of mine, but rather the inevitable conclusion based upon fact. Parties holding the land claimed in this case, under and by virtue of school-warrants, are and have been in possession for years. Their possessory claims litigated among themselves an ejectment sued out and obtained against all of them in our State courts, and the knowledge of these facts possessed by the entire people of this section, together with the positive and unequivocal evidence afforded by the records of this court therein, fully sustain such conclusion; and it is singular only that, among those to whom all these matters must be well and fully understood, there should be found any who entertain the opinion that the United States has an interest therein.

As this court, being the proper tribunal, has definitely pronounced upon the validity of the title, the lapse of time, and absence of appeal, the title is absolutely in Gomez; and in the exercise of my official duty, I am required by the General Land Office to certify to such a state of facts. But were the case still undetermined, and within the jurisdiction of the courts, the United States would possess no more interest in the matter, for the reason that the land warrants would hold in the event of a defeat of the claimant's title.

In regard to turning over my records to the district attorney, I can only say, that the laws under which I act constitute me the custodian thereof, and prohibit absolutely any transfer of the same from my custody, except in such cases wherein appeals are pending. The law of 1861, relating to the latter class of cases, did not cover the Gomez case, a fact you doubtless knew when you drew up the dispatch already mentioned.

In conclusion, permit me to say, that in this or any other matter pertaining to my office, I do not propose to venture my opinion in opposition to the law as laid down by the United States District Court, but hold myself wholly amenable to its decisions. In refusing to certify a transcript such as you demand, I am acting with its expressed approbation.

If your position be correct, you have a legal remedy and means under the law to vindicate yourself, and crush

Your obedient servant,

JOHN O. WHEELER,
Cl'k U. S. Dist. Court, Southern Dist. Cal.

Appendix G.

Order of Dates.

June 5, 1857. Grant confirmed in the United States District Court for the Southern District of California.

December 22, 1857. McGarrahan purchases the grant of Gomez.

February 5, 1858. Decree of confirmation *entered in form nunc pro tunc*, as of June 5, 1857.

March 15, 1858. Appeal to the Supreme Court allowed to United States.

January 31, 1859. Motion to docket and dismiss appeal of *March* 15, 1858, as for want of prosecution, granted on application of General Sickles, and mandate issued to District Court to execute its decree of confirmation.

May 4, 1859. Mandate filed in District Court and order that it be carried out, entered thereon.

January 18, 1860. Mandate and order for its execution *erased* from the files of the District Court by the clerk Sims, "of his own motion."

February 27, 1860. A motion in the Supreme Court by Attorney General Black to rescind the decree, dismissing the appeal, and to recall the mandate. This motion was successful, and is the great adjudication adverse to the claimant, (see 23 Howard, 326.)

March 21, 1861. Order of Judge Ogier, in the District Court setting aside, "*of his own motion*," the decree of confirmation of June 5, 1857.

August 4, 1862. Order of Judge Haight, (Ogier's successor,) in the District Court, vacating Ogier's order setting aside the decree of confirmation.

August 25, 1862. An *ex parte* order of appeal, (taken in violation of a stipulation with McGarrahan,) improvidently allowed by Judge Haight to the United States. This is called the *second* appeal in this case.

October 6, 1862. Stipulation in writing entered into between United States district attorney and McGarrahan, not to take any steps towards perfecting this appeal until Judge Haight should hear McGarrahan's motion to set it aside.

December 4, 1862. Order of Judge Haight setting aside the *ex parte* order of appeal, on the ground that by the lapse of more than five years from the confirmation of the grant the

Government had lost its right of appeal, and that, therefore, the confirmation of *June* 5, 1857, was final.

September 11, 1862. Survey made and approved by the surveyor general of California, on application of McGarrahan, under the act of June 2, 1862.

December 29, 1862. Patent ordered by the Secretary of the Interior, (Hon. Caleb B. Smith,) to be issued for the grant as surveyed.

March 4, 1863. This order reaffirmed by Mr. Smith's successor in office, Secretary *Usher*.

March 14, 1863. Patent executed by President Lincoln, as evidenced by the record in the General Land Office, but withheld at instance of Goold and Black, acting as special counsel of the United States, though attorneys of the New Idria Company.

October 20, 1863. President Lincoln appealed to by General Sickles, on submitted argument, to direct the delivery of the patent to the memorialist. The President's examination of the case on the merits, and subsequent order soon afterwards directing the delivery of the patent.

February 29, 1864. A fraudulent transcript of the record in the District Court, filed in the Supreme Court on the *ex parte* vacated appeal of August 25, 1862, and the case docketed as though it were a subsisting and regular *appeal*.

April, 1864. Claimant's motion in the Supreme Court to dismiss this appeal. This motion denied, and the case ordered to be finally heard on its merits. (See 1 Wallace, p. 690.)

May, 1866. Case tried by the Supreme Court on the *second ex parte vacated* order of appeal, and the grant finally rejected. (See 3 Wallace, p. 752.)

July 6, 1870. Record of the patent discovered in the General Land Office.

July 25, 1870. This record defaced by order of Secretary Cox.

No.....

In the Supreme Cou

OF THE

UNITED STATES.

William McGarraha

Plaintiff in Error,

vs.

The New Idria Minin Company,

Defendant in Error.

Points and Authorities of the Defendan in Error.

S. M. WILSON,

Of Counsel for Defendant in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM McGARRAHAN,
Plaintiff in Error,

vs.

THE NEW IDRIA MINING COMPANY,
Defendant in Error.

POINTS AND AUTHORITIES ON BEHALF OF THE DEFENDANT IN ERROR.

This is an action of ejectment originally brought in the District Court of the Twentieth Judicial District of the State of California for the County of Monterey. The venue was changed to the County of San Jose, and the cause was there tried before the Hon. David Belden, Judge of said Court, without a jury. He, in accordance with the State practice, filed special findings of fact, together with his conclusions of law thereon, and rendered judgment in favor of the defendant. An

appeal was prosecuted to the Supreme Court of the State of California, and that tribunal affirmed the judgment of the District Court. From that judgment this writ of error is prosecuted.

This case is a mere sequel or continuation of the litigation through which the plaintiff, under pretense of having a Mexican grant, has attempted to obtain the New Idria Quicksilver Mine, which litigation commenced many years ago, and will be found reported as follows, viz:

United States *v.* Gomez, 23 How. U. S. R. 326.
Same *v.* Same, 1 Wall. U. S. R. 691.
Same *v.* Same, 3 Id. 753.
The Secretary *v.* McGarrahan, 9 Id. 298.
McGarrahan *v.* Maxwell, The N. I. M. Co. et al. 28 Cal. R. 75.

The attempt to recover the land in the present action was based upon a pretended patent.

The original of this pretended patent was not offered in evidence, but only a copy of a false entry from records of the Land Department.

The question involved here is: *Whether the plaintiff proved in the Court below that a valid patent issued to Vicente Gomez—his grantor.*

I.

What are the Requisites of a Patent?

The General Land Office of the United States was established by the Act of Congress of 25th April, 1812.

Brightly's Dig. 462, et seq.
2 Stat. at Large, 716, et seq.

Sec. 8 of that act provided "that all patents issuing from said office shall be issued in the name of the United States and under the seal of the said office, and be *signed* by the President of the United States, and *countersigned* by the Commissioner of the said office, and shall be recorded in the said office in books to be kept for the purpose."

By the Act of July 4th, 1836, (Sec. 6) the President, by and with the advice and consent of the Senate, is authorized to appoint a Secretary "whose duty it shall be to sign in his name and for him, all patents for land sold or granted under the authority of the United States."

Brightly's Dig. p. 463, Sec. 15.
5 Stat. at Large, p. 111, Sec. 6.

By the same act, the President in the same manner is authorized to appoint also a "principal clerk of the public lands," and a "principal clerk on private land claims," and also a "*Recorder of the General Land Office*, whose duty it shall be, in pursuance of instructions from the Commissioner, to certify and affix the seal of the General Land Office to all patents for public lands, *and he shall attend to the correct engrossing, and recording and transmission of such patents.*"

In case of the absence or sickness of the Commissioner, or vacancy in his office, the "principal clerk of the public lands" becomes Commissioner *ad interim*. "Whenever the office of Recorder shall become vacant, or in case of the sickness or

absence of the Recorder, the duties of his office shall be performed *ad interim* by the principal clerk on private land claims."

Id.

By the Act of March 3d, 1841, it is provided as follows, viz:

"It shall be the duty of the *Recorder of the General Land Office*, in addition to the duties now required of him by law, *to countersign all patents* issued from said office, instead of the same being countersigned by the Commissioner, as required by the eighth section of the Act entitled," etc.

Brightly's Dig., page 465, Sec. 31.

5 Stat. at Large, page 417, Sec. 2.

By the law as it was at the time of the occurrences in this case, a patent was required to be *signed* by the President personally, or through his Secretary appointed for the purpose, *and the Recorder was required to countersign the same*, affix the seal of the Land Office, and attend to the correct engrossing, recording, and transmission of the same to the patentee.

Patents for private land claims are not good unless *countersigned or certified by the Recorder* of the General Land Office, and he shall seal them.

Statutes supra.

The Secretary v. McGarrahan, 9 Wall. 314.

United States v. Commissioner, etc., 5 Id. 565–6.

3 Opin. Attorneys-General, 140—Attorney General B. F. Butler to Secretary of Treasury, July 25th, 1836.

Id. 167, same to same, December 23d, 1836.

Id. 630, J. J. Crittenden, Attorney-General, to Secretary of War, April, 1841.

See also the Curative Acts of Congress to validate patents where these forms of law were not complied with.

Brightly's Dig., p. 465, Sec. 30.
5 Stat. at L. 416.

II.

The Alleged Patent here was not Countersigned by the Recorder of the General Land Office.

This appears at the following places in the Transcript, viz:

Page 19, folio 45.
Page 27, fols. 63–64.

The form was prepared for execution, and the words "Acting Recorder" written with a blank before them, so that the "Acting Recorder" could place his signature there.

In getting up the transcript, some one (possibly the printer or a clerk) has attempted to punctuate, and commas are placed after the words "Lincoln" and "Secretary"; but it will hardly be contended in this Court that any such punctuation existed on the original paper, or the record; or, if it did exist, that it could make any difference. Mr. Lincoln does not appear in person, but only through his secretary. The secretary could never

be the recorder, or recorder *ad interim*. By the statutes cited above it will be seen that the several officers there named are of such dignity and importance that they are appointed by the President, by and with the advice and consent of the Senate. The secretary of the President never can be Acting Recorder. The two offices are not only incompatible, but the Act provides for a recorder *ad interim;* and he is the principal clerk on private land claims. (Brightly's Dig., p. 463, Sec. 16.)

The President of the United States could not *sign* a patent as such, and then *countersign* as Recorder *ad interim;* much less could his secretary, who merely signs the President's name, sign also as Acting Recorder.

The very terms "sign" and "countersign" imply the separate actions of two different officers, one of whom is subordinate to the other. (Webster's Dictionary, "*countersign.*") The action of both is necessary. The law as much requires countersigning as signing. The *countersign* is in this instance the most important. It is well known that in practice, the President and his secretary in signing patents not only do, but must, rely almost entirely on the information received from the General Land Office as to whether they should sign the patent presented them. They do not belong to the General Land Office. Personally they can know nothing of the decrees confirming claims, or of the surveys, or of pre-emption claims, etc. They must, therefore, act when the Land Department advises them that a person is entitled to a patent, and that the document presented is correct. But the *Re-*

corder of the General Land Office is the very functionary appointed by law to *personally* acquaint himself with all matters pertaining to patents. His duties are manifold, and the statutes give them in detail. "He shall attend to the *correct engrossing* and recording, and transmission of such patents." (Brightly's Dig., p. 463, Sec. 13.) "He shall prepare alphabetical indexes of the names of patentees, *and of persons entitled* to patents." (Id.) "He shall certify and affix the seal of the General Land Office to all patents for public lands." (Id.) It is also his duty "to *countersign* all patents issued from said office," and this "in addition to the duties now [theretofore] required of him by law." (Id. 465, Sec. 31.)

It is therefore manifest that, under the statute, the action and countersignature of the Recorder are most essential. It is his attestation alone that gives assurance of accuracy and regularity; for he alone of the parties signing personally knows that what is about to be done, should be done. Literally, he should not only countersign, but certify, yet the Attorneys-General have held his countersignature a sufficient certificate. But his countersigning is the attestation that gives verity to it; the signature of the President gives it only dignity, and is the merest form in law and fact of which one can conceive. "All the duties respecting the execution of patents, *excepting the attestation*, are ministerial, and may be performed by the clerks or Secretary."

Brightly's Dig. p. 463, note g.
3 Opin. Attorney-General, 623.

The very meaning of "countersigning" is "attesting by the signature of a subordinate officer."
Webster's Dictionary.

There is no such officer as "Acting Recorder"; in case of the sickness or absence of the Recorder, or of a vacancy in the office, the law appoints, as we have seen, not an "acting Recorder," but a "Recorder *ad interim*." He is an officer *de jure* as much as the Recorder himself when present.

The paper writing then referred to was no exemplification of a patent, and the original, which it was supposed to represent, was impotent to convey title out of the United States to plaintiff's grantor.

The Act of Congress of 3d March, 1843, (5 Stat. at L. 627, Secs. 1 and 2) relied on by plaintiff in error, and the other Act of the same date, (Id. 416) were mere curative acts, operating on past entries in the records and patents already issued. They were not designed as a direction to the officers to commit the mistakes and make the omissions anew, which had caused this legislation. As to the past, the patents, of the kind referred to, were made good, as if they "had conformed to the requirements of the law." As to the records, where the names of the officers signing and countersigning had not been inserted *in full* in the records, the "*literal exemplifications*" were to be deemed and held of the same validity, "as if the names of the officers signing and countersigning the same, *had been fully* inserted in said record."

We have had similar curative legislation in California. Copies from the old records of deeds,

etc., even where acknowledgments are omitted or imperfect, are made evidence; but no license is thereby given to commit the same errors anew.

III.

The alleged Patent was never signed by any Person, and the Original now lies unexecuted in the General Land Office at Washington.

See Transcript, p. 19, folio 46.
" " 27, " 63–64.

The cause of all this will be manifest upon referring to the history of the case.

Short as this transcript is, it tells a story that would fill volumes. A mere abstract of it will here be given, so that a complete understanding of the case may be had.

Vicente P. Gomez filed his petition with the United States Commissioners on Private Land Claims, on the 9th February, 1853, claiming under a Mexican grant a tract of land called Panoche Grande. On the 6th of March, 1855, it was rejected, and an appeal taken to the District Court of the United States for the Southern District of California. (Transcript, pp. 20, 21.)

On the 5th of June, 1857, *by a fraud* practiced on the United States District Court, a decree of confirmation was obtained, but the decree not having been signed at that time, it was entered after-

ward, in furtherance of the same fraud, in due form, on the 5th of February, 1858, *nunc pro tunc.* as of the 5th of June, 1857. (This is a decree found in the record at pp. 20, 21.)

This fraud, so far successful, required further proceedings to make the scheme complete, and a *pretended appeal* was taken to the Supreme Court of the United States, and at the December Term, 1858, by a fraud practiced upon that Court, the cause was docketed and the appeal dismissed, leaving the fraudulent decree of the District Court standing; a mandate to the effect being issued by the Supreme Court.

But notice of these frauds coming to the Attorney-General of the United States, he moved the Supreme Court to rescind its order and decree, which was accordingly done. (Transcript, pp. 21, 22.)

The appeal itself was a sham and fraud, and all these fraudulent proceedings are fully commented upon in United States v. Gomez, 23 How. S. C. U. S. 326, et seq., which is the decision of the Supreme Court referred to in this transcript, pp. 22, 23.

Judge Ogier of the United States District Court, when the mandate of the Supreme Court went down, set aside, on the 21st of March, 1861, all the proceedings had in the case, and placed the cause on the calendar for trial *de novo.* (Transcript, fol. 52.)

But on the accession of Judge Haight (after the death of Judge Ogier) to the bench of the District Court of the United States for the Southern

District of California, and on the 4th of August, 1862, he vacated and set aside Judge Ogier's order. (Id.)

On the 25th of August, 1862, which was of the June Term, an appeal from the decree of confirmation was granted to the Supreme Court; but at the December Term, 1862, the District Court undertook to vacate and set aside that appeal. (Transcript, folios 52 and 53.) The terms of Court were fixed by Act of Congress, and this Honorable Court will take judicial notice of them. (See Brightly's Dig. p. 108, Sec. 18.) At this stage of proceedings the question arose as to whether the decree of the District Court had become final, or whether the appeal to the Supreme Court was pending, notwithstanding the order of Judge Haight vacating the appeal. That Hon. Judge vacated the order granting the appeal, upon the ground that it had been made more than five years after the decree of the District Court; that being the limit within which appeals can be granted. (Brightly's Dig. 258, 260, 261.) In doing this he considered the decree as rendered on the 5th June, 1857, instead of 5th February, 1858, when it was really signed. (Trans. fol. 49.) Whether the appeal was rightly granted, depended on which of these dates should be taken as the date of the decree, for the appeal was granted 25th August, 1862. Five years after June 5th, 1857, expired June 5th, 1862, and so the appeal would be too late. But five years after 5th February, 1858, carried the time beyond 25th August, 1862. Acting further on the idea that the appeal was not

taken in time, and that the decree of the District Court had become final, a survey was made, (about which something will presently be said) and an application for a patent presented by McGarrahan as the successor of Gomez. (Fol. 23.) The then Secretary of the Interior, Hon. Caleb B. Smith, was of the same opinion as Judge Haight, and on the 29th December, 1862, decided that the decree of the District Court had become final, and ordered a patent to be issued. (Fols. 23–24, 62.) On the 4th March, 1863, Secretary Usher was of the same opinion. (Fols. 24, 25.) Thereupon steps were taken to write up a patent and such a paper was *prepared* for execution, but "was never executed by the President of the United States, nor delivered to the grantee" and the "original instrument is now on file" in the General Land Office at Washington, but it is not treated as a part of the records of that office. (Fols. 25, 26, 46, 63.)

At that time it was the custom of the registering clerks in the Land Office to make a record of patents as if really signed, *in anticipation* of their being submitted to the officers to be signed, and this unexecuted patent was so entered in the record book before it was signed by any person. (Fols. 63, 64.) But this entry is not regarded or treated in the General Land Office at Washington as a part of its records. (Fol. 46.)

On the thirteenth of March, 1863, the Secretary of the Interior sent an order to the Land Department to suspend the execution and delivery of the patent under the decision of the fourth of March, 1863, until further advised by the Secretary,

(Folios 63 to 65.) The reason of this suspension of any further action was, doubtless, because the Land Department had become satisfied that it would be better to let the Supreme Court of the United States determine itself whether the decree of the District Court was final, and whether the appeal had been granted in time; for we find at the very next term of the Supreme Court—December, 1863—the case came before that Honorable Court, on McGarrahan's motion to dismiss the appeal as not having been made in time. The Court denied the motion, and not only held that the appeal was in time, and suspended any further action in the Court below, but the Court entertained the appeal, and reversed the decree of the District Court, and rejected the claim. It was likewise held that, though the decree was obtained by fraud, and was therefore void, still, being in form a decree, it would sustain an appeal to correct the fraud and dismiss the case.

United States *v.* Gomez, 1 Wall. 691.

Same Case, 3 Id. 753.

After this, McGarrahan resorted to other expedients to obtain a patent, and was still struggling to that effect in 1868 and 1869. He applied to the Executive Department of the Government, and that department decided against him. The Courts of California, by virtue of the Code of Civil Procedure of that State, took judicial notice of the official acts of the Executive Department. (Code Civ. Pro. 1875, Sub. 3.) "In all of these cases the Court may resort for its aid to appropriate books or documents of reference." (Id. Sub. 8.)

Reference was and is therefore made to The Secretary *v.* McGarrahan, 9 Wall. 298, and to the opinion of the Attorney-General Smith, annexed hereto.

But not only did the Supreme Court of the United States hold, in the cases cited, that the decree of the District Court was not final, and that the appeal was taken in time to give the Supreme Court jurisdiction, but the Supreme Court of California followed the decision of this Honorable Court and decided the same way in the case of McGarrahan *v.* Maxwell et al. 28 Cal. R. 75. That was ejectment brought upon the decree of the United States District Court as final, and the survey which appears in the transcript in the present case. That case was twice argued and twice decided; first, at the October Term, 1864, (not published) and next at the April Term, 1865, as reported in 28th Cal. R. 75. The decision each time was the same way; the decree was held not to be final, and the appeal held to be well granted and to be pending.

After this, the Land Department at Washington yielded to the superior authority of the Supreme Court of the United States, and conceded its want of power to act in the premises, for no order was ever given by the Secretary, after his suspensory order of 13th March, 1863, (fol. 63-64) toward issuing any patent.

On the 11th of July, 1870, the plaintiff, having found that the unexecuted paper had been entered in the record book as if signed by the President, (though in fact it had not been signed) demanded

an exemplification (fol. 25). We refer to the official action of the executive department on the subject, (of which the Court may take judicial notice) as contained in the opinion of the Attorney-General, annexed. Pursuant to the directions of Secretary Cox, the Commissioner and Recorder made the entry in the record, written across the same, which is, in substance, that *that* record had been made merely in anticipation of the execution of the original, which then remained in the office unexecuted (fol. 26–63). The Secretary not only directed that this particular entry should thus be made to speak the truth, but directed that all others in the same category should likewise be canceled, and that the custom of recording papers before their execution should be thenceforth discontinued. (See this order in the Opinion of Assistant Attorney-General Smith, annexed.)

On the 15th of June, 1871, the plaintiff addressed a memorial to the Hon. Secretary of the Interior, requesting a restoration of the record. The contents of that memorial and its representations do not appear from the record. The President, however, referred it to the Secretary of the Interior (fols. 26, 27); and his action appears in the opinion and papers annexed to this brief. It is respectfully submitted that that opinion is sound as to the power of the officers over the records.

The plaintiff being driven to take the record as it is, with the truth and not a falsehood appearing in it, presented in the Court below the document, called Exhibit No. 2, (fol. 46, et seq.) under the certificate thereto attached. Upon this so-called exemplification he claimed to recover.

IV.

The Officers of the Land Department had the Power and Jurisdiction to Correct the Records, and make them conform to the Facts.

It is within the legal power of the officers of the Land Department to cancel patents themselves, perfect in form before delivery, when improperly made. It has not only been the common practice to do so in such cases, but even after delivery, patents have been recalled and canceled, and new ones issued. Such subsequent patents have been held good.

Bell v. Hearne, 19 How. 262.
Doswell v. De La Lanza, 20 How. 33.
Maguire v. Tyler, 8 Wall. 664.
Same Case, 1 Black, 199.
Galt *v.* Galloway, 4 Pet. 342–3.
Opinion of Wm. Wirt, Attorney-General, Putnam's Case, 2 Land Laws Inst. and Opinions, 28, 29.
Webster's Case, Id. 32–34.
2 Opinion Attorney-General, 41.
1 Id. 458.
1 Lester Land Laws, 659–661, Opinion of Attorney-General Legare.

If a patent itself can be recalled and canceled, it must follow that the record of such patent may and should be canceled.

It is equally clear that a false record of a patent never executed may be corrected so that it may conform to the truth, and such power over the record has been decided and acted on by the following authorities, viz:

1. Mr. Secretary Cox.
2. Mr. Secretary Cowen.
3. Commissioner Wilson.
4. Assist. Att'y-General Smith.

See opinion annexed; also Land Office Reports, 1871, pages 54 to 62.

It has already been shown that, by the Act of Congress, it is made the special duty of the Recorder of the General Land Office to "*attend to the correct engrossing, and recording, and transmission of such patents.*"

Brightley's Dig. p. 463, Sec. 13.

The word "*correct*" applies as well to recording as to engrossing. If an error occurs in engrossing he must detect and correct it. If an error occurs in recording he must attend to it. This very fact implies that an entry in a record book does not constitute in itself a verity. He must examine it, and if it is false, if a mistake has occurred, if that has been entered which should not have been, his power of correction is manifest. It is a jurisdiction and power which he may exercise, and when he does exercise it the presumption is that he exercised it in a rightful case and did his duty.

U. S. *v.* Dandridge, 12 Wheat. 69.

Lea *v.* Polk County Copper Co. 21 How. 494.

Bagnell *v.* Broderick, 13 Peters, 448.

What stronger case can be put, by way of illus-

tration, than the case at bar? The Secretary orders a patent to issue; a clerk engrosses one, ready to be signed by the President and countersigned by the Recorder; the Clerk records it as if signed by the President, before such signature has been attached; the Secretary countermands the order; the paper prepared to be signed lies in the office yet unsigned; the Supreme Court reverse the very decree on which the patent was based, and the Land Department, of course, not only move no further in the matter, but have no power to issue the patent. Yet there stands that record book made by a mere copying clerk. Neither that book nor the original copied there has ever been touched by either the President or the Recorder. Must it stand to eternity, bearing a lie on its face, or is it the duty of the Recorder to correct it, and make it conform to the truth? Can there be any doubt of the power under the law requiring him to see to a correct record? If he had the power, it is presumed to have been rightly exercised. The Commissioner joined the Recorder, with the co-operation of the Secretary of the Interior, in canceling the record.

Of course a patent rightly issued is beyond the power of the officers. A record rightly made and correct cannot be made to be false, by any officer. But where the power exists in a certain case, as has been shown, then its exercise is presumed to have been on facts making such a case, and the maxim applies: "*Omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium.*"

The Commissioner and Recorder recite on the

face of their entry of cancelation, the facts showing that the case was one within their jurisdiction.

This principle was acted upon in Rice, adm., etc., v. Cunningham. (29 Cal. 498.) In that case it appeared that alcaldes were in the habit of doing exactly as the clerks in the Land Office did, that is, making the record of the grant complete before the execution of the original. When the original was "not taken" by the grantee, words to that effect were written on it, and lines of cancelation drawn. The Court held: "This is not, as counsel seem to argue, the case of an altered or mutilated record. The words 'not taken' and the cross-lines are a part of the record itself, and not an alteration or mutilation of it. At least they must be presumed to be so until the contrary appears, for such was the usual ordinary official mode of canceling a grant which from any cause had never been 'taken out' or delivered, and therefore, notwithstanding its apparent validity, null and void."

There can be no presumption that these officers committed a felony. (See Brightly's Dig. p. 213, Secs. 64, 65.) Innocence and a compliance with the law are always presumed.

Matthews on Pres. Ev. 25 *et seq.*

1 Greenl. Ev. Secs. 34, 35.

V.

The Alleged Patent is Void on its Face—it therein appearing that the Officers had no Power to Issue it.

The so-called exemplification produced on the trial below, and claimed to be of equal dignity with a patent, and the entry in the record book of the Land Department, so exemplified, give an historical account of the various proceedings on which the alleged patent is based. (These have been mainly referred to above.) They show the various proceedings taken in the Land Commission and the District Court resulting in the decree of 5th February, 1858; also the proceedings to set aside the same and the several orders of the Judges Ozier and Haight vacating and re-vacating the several previous orders made, including the order granting the appeal to the Supreme Court of the United States and the order vacating it. (Fols. 47 to 54.) These proceedings appeared in the records of the two cases referred to—McGarrahan v. Maxwell et al. (28 Cal. R. 89) and The United States v. Gomez (3 Wall. 767). Upon these facts, in both of those cases, it was held that the appeal was well taken; that the order of Judge Haight vacating the order granting it was without effect; and that the jurisdiction fully

vested in the Supreme Court of the United States.

Independently of these decisions, it is clear that the United States District Court had no power at a subsequent term to set aside an appeal granted at a previous term.

Cameron v. Roberts, 3 Wheat. 591.
McMicken v. Perrin, 18 How. 511.
Bk. U. S. v. Moss, 6 Id. and cases cited.
Helm v. Boone, 6 J. J. Mar. 366.
Casement v. Ringold, 28 Cal. 338.
DeCastro v. Richardson, 25 Id. 50.

Even if an appeal be improvidently granted, the application to dismiss must be made in the appellate tribunal.

Fleet v. Young, 11 Wend. 525.
Higgs v. Evans, 2 Str. 837.
Adin v. Cook, 1 Root R., 54.
Eager v. Conim. 4 Mass. 182.
Street v. Hopkins, Lee's Cases, temp. Hardw. 345, 3 Bac. Abr. 1832, p. 114, title Error in Law.

WHAT WAS THE EFFECT OF THE APPEAL?

This is fully determined by the Supreme Court of California in the case of McGarrahan v. Maxwell, referred to. The language of this Court is plain, clear, and conclusive, viz: "The effect of this appeal was to suspend all proceedings in the Court below, and preclude the doing of any act for the purpose of carrying the decree into effect; it remaining inoperative for any purpose until

the appeal was disposed of. The operation and effect of an appeal from the decree of the United States District Court, approving the survey of a confirmed grant, was considered by us in Thornton v. Mahoney, 24 Cal. 569, and we held that the appeal having been perfected, all further proceedings upon the survey and the decree approving it became suspended, and that while the appeal remained pending, it was a bar to all further proceedings in the Court below. The appeal in this case, as in that, operated as a supersedeas, neither an order to that effect nor an appeal bond being required. (See United States v. Pacheco, 20 How. 263; Woodbury v. Bowman, 13 Cal. 634; Saunders v. Whitesides, 10 Cal. 89; Helm v. Boone, 6 J. J. Marsh. 353.)"

Again, (on page 94) in considering the survey, the Court says, the appeal being taken, "no proceedings to carry the decree into effect, by means of a survey, or in any other manner, could lawfully have been had."

The letter of the law itself, as well as the spirit, is in accordance with this view; for the Surveyor-General can only make a survey *after final confirmation* by the Commissioners or District Court, or the Supreme Court of the United States.

Brightly's Dig. p. 113, Sec. 46.

The Act of May 3d, 1853—10 Stats. at Large, 245.

7 Opinion Attorneys-General, 495.

Before the time for taking an appeal expires and pending an appeal, there is no final confirmation.

Hills v. Sherwood, 33 Cal. R. 479, and cases cited.

The appeal was granted the 25th of August, 1862. The survey was approved by the Surveyor-General 11th of September, 1862 (fol. 61). The order granting the appeal was not vacated till December, 1862, which order, as shown above, was null and void.

It appearing, then, from the so-called patent itself, that the survey was made pending the appeal, it was null and void, being contrary to law.

THE SURVEY.

But the survey was not only without authority of law in the respect named, but was made under the Act of June 2d, 1862, (12 Stats. at Large, 410; Transcript, fol. 54.)

The survey should have been made under the Act of June 14th, 1860, (10 Stats. at Large 33) and the requirement of the last-named act not having been complied with, the survey, even had it not been prevented by the appeal, would not be a lawful survey, but was ineffectual for any purpose. The same survey was held bad and inadmissible in evidence in McGarrahan v. Maxwell et al. Supra; See also Mahoney v. Van Winkle et al. 21 Cal. 552; Johnson v. Van Dyke, 20 Id. 228.

The survey, therefore, is void for this reason, as well as because made pending the appeal.

Referring back again to the alleged patent, we find it, therefore, to be void, 1st, because there

was no *final* decree of confirmation; and 2d, no lawful survey, and without both of these constituents, the attempt to issue a patent was utterly ineffectual. The attempt, it is true, was made under the idea that the appeal had been taken too late; and that the survey was rightly made under the Act of 1862; but as these two points have both been determined to be erroneous, the alleged patent, if otherwise formal, was void, because when made there was neither final decree nor final survey. We might, indeed, upon this point, have relied upon the opinion of the Supreme Court of California, to be found in the record, and confess that what we have added is a work of supererogation.

VI.

The Defendants here may attack the Alleged Patent.

"It is settled by the decisions in this State that if a patent be void upon its face it may be assailed at any time and in all cases, for it is itself, in such case, record evidence of the matters which render it a nullity."

Rondel *v.* Fay, 32 Cal. 362.
See, also, Durfee *v.* Plaisted, 38 Id. 83.
Doll *v.* Meador, 16 Id. 324.
Terry *v.* Megerle, 24 Id. 629.
Polks' lessee *v.* Wendell, 9 Cranch, 98, et seq.

S. C. 5 Wheat. 303.
Patterson *v.* Winn, 11 Cranch, 384.
Stoddard *v.* Chambers, 2 How. U. S. 317.
Ladiga *v.* Roland, Id. 590.
U. S. *v.* Stone, 2 Wall. 535.
Richards *v.* Filps, 6 Id. 165.
State Minnesota *v.* Bachelder, 1 Id. 114.
Wilcox *v.* Jackson, 13 Pet. 511.
Lindsay *v.* Miller, 6 Id. 674.
Crown *v.* Lessees of Clement, 3 How. 507.
Jackson *v.* Lawton, 10 Johns, 26.
Jackson *v.* Hart, 12 Id. 83.
Alexander *v.* Greenup, 1 Munf. 140.
Bledsoe's Heirs *v.* Well, 4 Bibb, 329.
Wright *v.* Rutgers, 14 Mo. 585.

It is respectfully submitted that the judgment should be affirmed.

S. M. WILSON,
Of Counsel for Respondent.

September, 1877.

OPINION OF ASSISTANT ATTORNEY-GENERAL SMITH,

HEREINBEFORE REFERRED TO.

DEPARTMENT OF JUSTICE, OFFICE OF ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, July 20th, 1871.

SIR: I have carefully examined the application of Wm. McGarrahan, to have the record in the General Land Office restored to the condition it was in prior to July the 25th, 1870. Before I proceed to consider it, I will give a concise history of this celebrated McGarrahan claim.

March 13th, 1844, one Vicente Gomez presented to Micheltorena, then Governor of California, a petition praying the Governor to grant to the petitioner "the place known by the name of Panoche Grande, bounded on the north by Don Julien Ursaa; on the south by the Serriania (mountain range); on the east by the Valley de los Tulares; and on the west by Don Francisco Arias; which tract of land contains three square leagues, a little more or less, as shown by the map, which in due time I will present more correctly drawn than the one now presented."

The Governor directed the Secretary of State

to make the necessary investigations and to report the result.

The Secretary of State, Manuel Jimeno, sent the petition to the first justice of San Juan, the 14th of March, 1844.

The Justice, José Antonio Rodriguez, reported March 20th, 1844, that the land was vacant, and that there was no reason why the petition should not be granted.

Gomez alleged that a grant had been made to him, and that his papers were deposited in a building in Monterey, and that the building was taken possession of by the United States troops in July, 1846, and that most of the papers were lost or destroyed.

By the treaty of Guadalupe Hidalgo, of February 2d, 1848, it was provided that Mexicans established in California might retain their property, and that the United States should pass such laws as might be necessary to give effect to the stipulations of the treaty. (9 U. S. Stats. 929, Treaty, Articles 8 and 11.)

By the Act of Congress of March 3d, 1851, a board of land commissioners was authorized to ascertain and settle land claims in California, subject to an appeal (provided for elsewhere) to the United States District Court, with a right of final appeal to the Supreme Court of the United States, within five years from the time of making decree.

On the 9th of February, 1853, Gomez, by Pacificus Ord, his attorney, filed his claim for Panoche Grande before the board of commissioners.

On the 6th of March, 1855, the board rejected

the claim. The following is a copy of their decision :

"Vicente Gomez *v.* The United States, No. 569 ; claim for a place called Panoche Grande, containing four square leagues, situate in the county of Monterey. The petitioner in this case states in his petition that he had a grant for the above-named place, issued in the year A. D. 1844, by Governor Micheltorena, and that the grant was among the archives of the State, in Monterey, at the time that the archives fell into the hands of the Americans, in July, 1846, and that it was either lost or destroyed. He has also given satisfactory proof of the existence and loss of the grant, but has failed entirely to offer any proof whatever going to show that he ever occupied, improved, or cultivated any part of the land, or that he ever saw the land. We are, therefore, of the opinion that the claim is invalid, and a decree rejecting the same will be entered. Rejected."

While the case was pending before the board, Ord was appointed United States District Attorney for the District of California. Gomez appealed from the decision of the Board to the District Court of the Northern District of California.

Ord procured a transfer of the case from the Northern to the Southern District on the ground that the land lay in the Southern District.

Gomez, on the 24th of November, 1856, conveyed one-half of the tract to Ord for the nominal consideration of one dollar.

After the appeal, the Supreme Court of the United States, in the case of Fremont *v.* United

States, (17 How. 542) decided that possession was not necessary to the validity of a Mexican grant.

On the 5th of June, 1857, Ord handed the record to Hartman, an attorney, and informed him it was a case in which there was no dispute, and requested him to move the Court to reverse the decision of the Board and confirm the title. He did so. Ord informed the Court that the United States had no objection, and thereupon the Court, without investigation or argument, ordered the title to be confirmed. The Court omitted to sign the decree.

On the 22d of December, 1857, Gomez conveyed Panoche Grande to McGarrahan, subject to the interest of Ord in the same. The consideration stated in the deed was eleven hundred dollars ($1,100).

On the 8th of February, 1858, the decree was signed and entered *nunc pro tunc.*

It appears that an appeal was docketed and dismissed in the Supreme Court at the December term, 1858, and that the decree of dismissal was set aside and mandate revoked at the December term, 1859, of the same Court. This last case is reported in 23 Howard, 326.

On the 21st day of March, 1861, the District Court (Judge Ogier) on motion set aside all proceedings before that had in his Court, on the ground that the decree had been obtained by fraud, and directed that the cause be put on the calendar and set for trial *de novo.*

On the 4th of August, 1862, Judge Ogier having died, his successor, Judge Haight, on application of claimant, set aside the order of Judge Ogier ast named.

An appeal was then regularly moved for and allowed on the part of the United States. The claimant then moved to set aside the order of appeal on the ground that five years had elapsed from the date of the decree, which he contended was June, 1857; the decree of the 5th of February, 1858, having been entered *nunc pro tunc*, as of June, 1857.

December 3d, 1862, Judge Haight sustained this view, and set aside the order of appeal.

December term, 1863, the Supreme Court overruled Judge Haight, and held that the order of appeal was in time. (Gomez v. The United States, 1 Wall. 690.)

In the meantime, and on the 29th of December, 1862, Caleb B. Smith, then Secretary of the Interior, ordered the Commissioner of the General Land Office to issue a patent to McGarrahan for the land, in accordance with the survey reported by the Surveyor-General of California.

March 4th, 1863, J. P. Usher, then Secretary of the Interior, affirmed the decision of Secretary Smith, and directed that a patent should issue.

March 12th, 1863, Attorney-General Bates wrote to the Secretary of the Interior, requesting him to forbid the issuance of a patent, and gave as his reason for making the request that he desired to have the case reviewed by the Supreme Court.

March 13th, 1863, Acting Secretary Otto directed the Commissioner of the General Land Office to suspend the execution and delivery of the patent until further advised by the Secretary.

December term, 1865, the Supreme Court decided the case *on its merits*, and reversed the decision of the District Court, and directed it to *dismiss the petition.* (United Stated States v. Gomez, 3 Wall. 752.)

April 18th, 1867, the local officers in California were instructed to suspend all action affecting the title to the Panoche Grande until the matter should be disposed of by Congress.

October 5th, 1868, McGarrahan presented to the Secretary of the Interior a petition asking for the benefits of the seventh section of the Act of July 23d, 1866 (14 Stats. 219). This seventh section provided that persons who, in good faith and for a valuable consideration, had purchased lands of Mexican grantees or assigns, which grants had subsequently been rejected or excluded on final survey, and had used, improved, and continued in the actual possession of the same according to the terms of the original purchase, and where there was no valid adverse title (except of the United States), that such persons might purchase the lands of the United States at the minimum price: *Provided*, That such right to purchase should not extend to lands containing mines of gold, silver, copper, or cinnabar.

October 27th, 1868, he asked that such portions of the Panoche Grande as did not contain "mines of gold, silver, or cinnabar," might be patented to him upon his paying the minimum price under said seventh section.

August 14th, 1868, Secretary Browning declined to express any opinion upon the legal

question made by these memorials, as the matter was then pending before Congress.

This question does not appear to have been determined by the Department. Secretary Cox, in his letter to the Commissioner of the General Land Office, of August 13th, 1870, (vol. 12, page 269) refers to it as though it had been determined by the Supreme Court in the case of the Secretary v. McGarrahan (9 Wall. 298).

The Court say in that case the petition was defective in not showing on its face that the lands did not contain "gold, silver, copper, or cinnabar."

And, again, "his application to be allowed to purchase the land was made to the Secretary of the Interior, and he was as much bound to prove that the land did not contain mines of the description mentioned, as he was to show that his purchase of the donee of the tract was made in good faith and for a valuable consideration, as he was not entitled to a patent if the lands contained mines of gold, silver, copper, or cinnabar any more than if he had made the purchase in bad faith and without consideration."

The Secretary, in his letter of August 13th, 1870, virtually disposes of the McGarrahan case, and adversely to him, and directs the Commissioner to take up the application of the New Idria Mining Company, and pass upon it.

There is found recorded in vol. 4, pages 312 to 321, inclusive, of private land grants in California, now in the General Land Office, a patent to William McGarrahan for Panoche Grande. It concludes as follows:

"In testimony whereof, I, Abraham Lincoln President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, this fourteenth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the eighty-seventh.

"By the President,

[SEAL.] "ABRAHAM LINCOLN,

"W. O. STODDARD, Secretary.

"By —— ——,

Acting Recorder of the General Land Office."

The record is marked "Ex'd" for examined.

There is a pencil mark over the following words in the attesting clause and signatures, to wit, "fourteenth," "March," "sixty-three," "eighty-seventh," "Abraham Lincoln," "W. O. Stoddard," and "acting." This mark is now quite indistinct.

There is in pencil, at the left of the attesting clause, the words, "not signed." These words are more distinct.

On page 321, being the last page of this record, there is written thereon, in red ink, a certificate, of which the following is a copy.

"DEPARTMENT OF THE INTERIOR,
"General Land Office, July 27th, 1870.

"This record, from pages 312 to 321, inclusive, was made in accordance with the custom at the time, in anticipation of the original being sub-

mitted to the officers whose duty it is under the law to sign land-patents; but an order, dated March 13th, 1863, having been received from the Acting Secretary of the Interior to suspend the execution and delivery of the patent, under the decision of the Department of the 4th of March, 1863, until further advised in the case by the Secretary, the form of patent which had been prepared, and from which the aforesaid record was made, was not submitted for signature, and has never been dated, signed, nor delivered.

"JOS. S. WILSON,
"Commissioner.

"J. N. GRANGER, Recorder."

This certificate was made on the record, by reason of a letter from Secretary Cox, of which the following is a copy:

"DEPARTMENT OF THE INTERIOR,
"Washington, D. C., July 15th, 1870.

"SIR: I have received your letter of the 13th inst., in relation to the application, dated the 11th inst., of George W. McGill, as attorney for William McGarrahan, for a certified copy of the record of the Panoche Grande patent. You inform me that the patent was never signed by the President's Secretary to sign land-patents, or countersigned by the Recorder of the General Land Office, and that the seal of your office was never affixed thereto.

"As the record is, in your opinion, incomplete, wanting the name of the Recorder or Acting Recorder, you request the ruling of the Department

as to whether the copy should be furnished, in view of the provisions of the Act of July 2d, 1864, entitled 'An act prescribing the terms on which exemplifications shall be furnished by the General Land Office.'

"You send me the original instrument and the proposed form of certificate to be attached to the copy asked for, in case such copy should be furnished.

"Your statement is fully established by an inspection of the instrument, and conforms to the evidence which the files of this Department furnish on the subject. I perceive that, by a letter of the Acting Secretary of the Interior, of March 13th, 1863, your office was directed to suspend the 'execution and delivery of the patent until further advised in the case by the Secretary.' No subsequent order or direction in conflict therewith appears. The instrument was never perfected in the mode required by law, and it was in this incomplete state improperly admitted to record. It cannot be considered a patent in the legal sense of the term. A paper writing, purporting to convey lands in fee, if never signed, sealed, and delivered, is not a deed, nor is it effectual to pass the title to the land therein described.

"You informed me in our personal interview that it had been the practice to record these inchoate and unperfected patents, including the name of the President's secretary, before he signed them; and that when they were subsequently so signed, the countersigning by the Recorder of the General Land Office was afterward affixed to the instru-

ment, and a corresponding change made in the record. I deem the practice to be an objectionable one, and you will give the requisite directions to the Recorder to discontinue it. The instrument should not be recorded until it is in all respects complete and ready for transmission to the party who is thereunto entitled. In every instance where record has been made of an uncompleted instrument in anticipation of the due execution of it, and the original is in your office, unsigned and unsealed, you will write across the record, in red ink, and in legible characters, a statement of the facts, attested by your signature, and countersigned by the Recorder of the General Land Office, and this statement should appear in the transcript or exemplification of the record of the instrument which you deliver.

"Under the circumstances of this case, I have no objection to your giving the requested copy, attaching a certificate in the form presented to me, upon the applicant's complying in other respects with the statute and regulations of your office. The papers accompanying your letters are herewith returned.

"I am, sir, very respectfully your obedient servant,

J. D. COX,
"Secretary.

"Hon. Jos. S. Wilson,
"Commissioner General Land Office."

There is also in the Land Office what purports to be the original patent. It corresponds in all respects with the record, except that it is unsigned by either the President or Recorder, has the fol-

lowing words in the attesting clause, to wit: "fourteenth," "March," "sixty-three," in pencil, and has no pencil marks drawn over any words, and does not contain the words "not signed" (which in the record are in pencil), and does not contain the word "Acting," preceding the word Recorder.

Joseph S. Wilson, who signed the certificate of July 25th, 1870, as Commissioner, was not Commissioner on the 14th of March, 1863, nor was J. N. Granger then Recorder, of the General Land Office. Both of these parties have testified before the Judiciary Committee of the House of Representatives that they had no personal knowledge on the subject, and did not know that the statements of their certificate of July 25th, 1870, were true, and the testimony of other parties connected with the Land Office has been taken before the same committee, for the purpose of showing how it was that the record came to be made before the patent had been executed, and that in point of fact the patent was never executed.

June 15th, 1871, McGarrahan presented to the Secretary of the Interior a petition reciting the history of the patent as recorded, and alleging that the patent was executed and recorded, and that "Secretary Cox ordered that the record of my (his) patent be destroyed, which was accordingly done on the 25th of July, 1870," and he asks that the Secretary "will be pleased to advise the President to order the restoration of the record of my (his) patent upon the records of the Land Office to the same condition in which it was placed by the decision of President Lincoln, and Secretaries

Smith and Usher, and to remove the unauthorized and illegal erasures made on it by direction of Mr. Cox, and that an exemplified copy of this unmutilated record be delivered to me (him)."

I have given thus briefly the entire history of this case, except the action of Congress, and will now proceed to state the conclusions to which I have arrived.

The eighth section of the Act of April 25th, 1812, (2 Stats. 717) provided that "all patents issuing from the said office, shall be issued in the name of the United States, and under the seal of the said office, and be signed by the President of the United States, and countersigned by the Commissioner of the said office, and *shall be recorded* in the said office in books to be kept for the purpose."

The duty of countersigning was afterwards imposed upon the Recorder instead of the Commissioner. (5 Stats. 417.)

It was the legal duty of the Commissioner to record all patents that had been issued under the seal of his office, signed by the President, and from the fact of such record the law presumes that the patent had been duly signed by the President.

In the United States *v.* Dandridge, (12 Wheat. 69) the Supreme Court said: "By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when these acts are the natural results or necessary accompaniment of other circumstances. In aid of this salutary principle the law itself, for the purpose of strengthen-

ing the infirmity of evidence and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man in his private and official character does his duty until the contrary is proved; it will presume that all things are rightly done, unless the circumstances overturn this presumption according to the maxim *omnia presumuntur rite et solemniter esse acta donec probitur in contrarium.* Thus it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that upon proof of title, matters collateral to that title shall be deemed to have been done. The books on evidence abound with instances of this kind."

In accordance with this settled rule the presumption is that the patent was duly signed. But it is only a presumption, and may be overcome by proof.

In Lea *v.* Polk County Copper Company, (21 Howard, 494) the facts were these:

A patent from the State of Tennessee had issued to William Park Lea. It was signed by the Governor, countersigned by the Secretary of State, and sealed with the great seal of the State. As originally filled out before signature, it was in the name of William P. Lea, and was altered to William Park Lea by adding the letters "ark" to the P. This was done by the Register of the Land Office, whose duty it was to prepare the patent for the signatures of the Governor and Secretary.

There was a William Pinkney Lea, and he and

William Park Lea wrote their names William P. Lea, the former always, and the latter generally, although he sometimes signed William Park Lea. Both had entered lands, and the Register added the letters "ark" to distinguish between them. It was claimed that William Pinkney Lea was the party whose name should have been in the patent. The Court, in disposing of the case, said: "Then presumption comes in that, as a public officer, the Register did his duty, and he who impeaches the act as illegal *must prove the allegation.* On this assumption the Register filled up the patent, as it is now found, before the Governor signed it and the seal of the State was attached; that is to say, when the patent bears date. Then, again, all the incipient steps authorizing the Register to issue the grant, the Governor to sign it, and the Secretary to attach the great seal, *are presumed as having been regular;* nor was the purchaser required to look behind the patent." (Baywell v. Broderick, 13 Pet. 448.)

This case is a clear admission by the Supreme Court that the actual facts in reference to a patent may be shown, and that, if necessary, the record may be contradicted and corrected. But how, and by whom? Shall it be in the department where it originated, or must it be in Court? Obviously, *when the patent has not been delivered,* it would be much more convenient, and certainly more expeditious, less expensive, and equally safe, to have the correction made in the Department, and under the supervision and control of the Secretary of the Interior, who is selected on account of his

high character. If the Secretary had personal knowledge that the record was untrue, and the error had arisen during his term of office, it is clear that he would have the power, and it would be his duty, to make the record speak the truth. Is it any less his duty, if the error occurred before his term, provided he is *fully satisfied* there is such error, although he may not have personal knowledge on the subject?

It seems to me that personal knowledge is not essential. In the various subjects that necessarily arise in one of the departments, it is utterly impossible that the Secretary can have personal knowledge of them all. He must trust to those who are under his charge, and it is proper for him to rely on their statements, when he knows that they are credible and worthy persons. In so grave a matter as altering the record of a patent, he should act with extreme caution, and after diligent inquiry.

In the case now under consideration, Secretary Cox has acted upon evidence that was satisfactory to him. If he had jurisdiction (which I think he had) and erred in his conclusions, it is settled by multiplied decisions of the Attorneys-General that you, as his successor, have no power to reverse him. See opinion of Mr. Wirt (2 Op. 9); of Mr. Taney (2 Op. 464); of Mr. Nelson (4 Op. 341); of Mr. Toucey (5 Op. 29); of Mr. Johnson (5 Op. 123); of Mr. Black (9 Op. 101, 301, 387); of Mr. Stanbery (12 Op. 358); of Mr. Hoar, of April 26th, 1869, and of Mr. Ackerman, of March 7th, 1871; also United States v. Bank of Metropolis, 15 Peters, 501.

In view of these authorities, if I differed with Secretary Cox as to the weight of the evidence, I should not feel justified in advising a reversal by you of what he had done; but I do not differ with him. In my opinion, after careful examination of all the light now shed upon the question, *the patent for Panoche Grande was not executed by the President.* Entertaining these views, I must advise adversely to the prayer of McGarrahan.

Very respectfully,

W. H. SMITH,
Assistant Attorney-General.

HON. C. DELANO,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, D. C. August 4th, 1871.

SIR: I have considered your application of 15th June last, requesting me to advise the President to direct that the certificate should be erased and canceled which had been written by order of Secretary Cox across the last page of the General Land Office record of the patent for the premises called "Panoche Grande." I must decline to grant your request. In my opinion the Secretary of the Interior has power to correct the record of

a patent at any time before its delivery, and perhaps afterward, so as to make it correspond with the facts. This power is not limited to cases of which he has personal knowledge, but he may act upon the statements and evidence of his trusted subordinates, and upon matters that took place before he became Secretary.

Secretary Cox having acted upon the subject now before me, I regard his action as conclusive, and beyond my power of revision or reversal, even though I should differ with him as to the acts.

But I do not differ with him. I think the weight of the evidence shows that the patent was not executed by the President.

I inclose a copy of the opinion of Assistant Attorney-General Smith on the subject, and agree with him in the conclusions at which he arrived.

Very respectfully,

B. R. COWEN,

Acting Secretary.

WM. MCGARRAHAN, ESQ.